No. 86-1640

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1986

PACE RESOURCES, INC.,

*Petitioner,*

vs.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NIELSEN, RICHARD M. GRIM, RONALD McKAY and LARRY G. SPANGLER,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 86-5210

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## Questions Presented for Review

A. When a municipality intentionally adopts a zoning ordinance declared unlawful under state law, is a developer entitled to damages under 42 U.S.C. §1983 for losses that occurred during the period the matter was contested in the state court?

B. Does a complaint that alleges the enactment of an unlawful zoning ordinance which the township adopted to destroy the only industrial development in the township state a cause of action under 42 U.S.C. §1983 as a violation of the United States Constitution, either as an unlawful taking without just compensation or as a violation of due process that goes to far?

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## Reference to Reports of Opinions Below

The Opinion of the District Court was filed on the 7th day of March, 1986, and is attached hereto (App. A).

The Third Circuit Court of Appeals' Opinion was filed on the 12th day of January, 1987 and is reported as 808 F.2d 1023 (3rd Cir. 1987).

## Statement of Grounds for Jurisdiction

The Opinion of the United States Court of Appeals for the Third Circuit was filed on January 12, 1987, and judgment was entered on February 3, 1987. Jurisdiction to review the judgment in question by Writ of Certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

## Constitutional Provisions and Statutes Involved

The United States Constitution provides:

### AMENDMENT V. (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT XIV. (1865)

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 provides:

> §1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE

# Supreme Court of the United States

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No._____

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PACE RESOURCES, INC.,

*Petitioner,*

vs.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NIELSEN, RICHARD M. GRIM, RONALD McKAY and LARRY G. SPANGLER,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 86-5210

### Statement of the Case

This Petition seeks a review of a final judgment of the Third Circuit Court of Appeals. The District Court's subject matter jurisdiction was based upon a Federal question arising from the following 42 U.S.C. §1983, the Fifth and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §1331 and an amount in controversy in excess of $10,000.00 and 28 U.S.C. §1343.

**Procedural History**

On March 11, 1981, Plaintiff, Pace Resources, Inc., hereinafter referred to as "Pace", filed a Complaint alleging that the Defendant, Shrewsbury Township, and its officials, hereinafter referred to as Township, had violated 42 U.S.C. §1981 and §1983 by enacting ordinances that were designed to prevent development of Pace's industrial park.

The Township filed Motions to dismiss the Complaint on July 24, 1982, the Lower Court following the recommendation of the United States Magistrate, issued an Order staying the proceedings pending the outcome of the State Court litigation.

On May 23, 1985, the Commonwealth Court of Pennsylvania held the ordinance amendment rezoning 37 acres of Pace's 145 acre industrial park from industrial to agricultural was "arbitrary" and unjustifiably discriminatory "zoning". The Court also affirmed that the water provisions of the Township's Subdivision Land Ordinance were void for vagueness.

On June 23, 1985, the decision of the Commonwealth Court of Pennsylvania became a final decision because no appeal was filed.

On August 26, 1985, Pace filed an Amended Complaint under §1981 and §1983 of the United States Civil Rights Act.

The gist of Pace's claim is that the Township officials prompted by relatives and neighbors intentionally abused their legislative executive and judicial powers to destroy Pace's development which was the only industrial development in the Township. This was

accomplished by changing the zoning of 37 acres of Pace's 128 acre industrial park from "industrial" to "agricultural" when it became apparent that Pace's efforts to construct a sewer line to the industrial park would be successful.

Pace's Complaint alleges the constitutional violations of the Township to be a taking under the Fifth and Fourteenth Amendment and a violation of the substantive and procedural Due Process under the Fourteenth Amendment arising from the abuse of the Township's government power.

The Township filed a Motion to Dismiss under 12(b)(6) alleging that the Court lacked jurisdiction, the Plaintiff had failed to state a cause of action and that the Court should abstain from assuming jurisdiction.

On March 17, 1986, the Federal District Court granted the Motion to Dismiss holding that while Pace's constitutional rights under the Fifth and Fourteenth Amendments had been violated, its damages, alleged to be in excess of $300,000.00, were a "by-product" harm that is not compensable under Federal law even for an admittedly and apparently intentional denial of constitutional rights.

On January 10, 1987, the United States Circuit Court of Appeals filed an opinion sustaining the District Court's dismissal order.

## Statement of Facts

Between April 2, 1975 and November, 1978, Pace expended over $140,000.00 in developing site improvements in its 145 acre industrial park. After selling six (6) lots, Pace was delayed in selling other lots by a Township directive that prohibited sales until Pace provided sewer service to the industrial park (App. F, p. 82a).

When it became clear in late 1978 that the sewer was being constructed by Pace, at the urging of some local residents and because one or more elected or appointed officials did not believe in growth or lived in the vicinity, the Defendants set about to cripple and destroy the development (App. F, p. 83a).

Among other things, the Defendants rezoned 37 acres of the 145 acre development from industrial to agricultural as a "buffer zone."

Pace appealed the ordinance changing the zoning in the State Court.

The ensuing litigation required about six (6) years to complete. Pace was successful in having the Pennsylvania Commonwealth Court strike the ordinance rezoning 37 acres from industrial to agricultural.

During the appeal period, Pace was unable to use its development and it suffered alleged losses of over $300,000.00 (*Id.* App. F, p. 91a).

A detailed statement of the facts presented to the Lower Court describing the evidence developed in the State Court proceedings is marked in the Appendix as Exhibit "F" (p. 82a).

## Reasons for Granting Petition for Writ of Certiorari

This application presents several highly controversial issues concerning civil rights and zoning that involve both conflicting Federal Court opinions and general confusion among the legal community which practice in the area.

The questions of whether a zoning ordinance may under "any" circumstances effect either a taking without just compensation or as a violation of Due Process that "goes too far" are squarely presented for determination.

The unanswered substantive legal questions presented to this Court in *San Diego Gas & Electric Company v. San Diego,* 450 U.S. 621, 67 L.Ed.2d 551, 101 S. Ct. 1287 (1981); *Agins v. City of Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S. Ct. 2138 (1980) and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* _____ U.S. _____, 87 L.Ed.2d 126, 105 S. Ct. 3108 (1985) are ripe for determination and may be answered by granting certiorari in the instant case.

In addition, the Third Circuit Court of Appeals has decided far reaching Federal questions in a way that conflicts both with a State Court of last resort and the reasoning of several Federal Courts, including this Court.

The factual basis of the case is uniquely suited to permit this Court to develop appropriate guidelines which balance the constitutional rights of individual land developers with the rights of municipalities to determine the proper use of land in the valid and invalid exercise of their police powers.

## EXPANDED ARGUMENT

**I. When a municipality intentionally enacts a zoning ordinance declared unlawful under state law, is a developer entitled to damages under 42 U.S.C. §1983 for losses that occur as a result of and during the period the matter was contested in the State Court?**

The District Court held that the adoption of the unlawful ordinance which rezoned Pace's land from industrial to agricultural did constitute a taking as both a violation of the Fifth Amendment and the Fourteenth Amendment (substantive Due Process). The District Court resolved the conflict between two Circuit Court decisions, one of which awarded damages, *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402 (6th Cir. 1984) and one which did not, *Citadel Corp. v. Puerto Rico Highway Authority*, 695 F.2d 31 (1st Cir. 1982) *cert. den.* 464 U.S. 815 (1983), by refusing to award damages. Pace was held to be entitled to *no relief* as all it was entitled to, "the Commonwealth Court granted." (App. A, p. 12a).

It is submitted that this case presents an excellent factual basis for determining whether damages may ever be awarded in a case involving zoning and its effect on the constitutional rights of developers.

To stop a development that was unpopular with persons in the neighborhood, the municipality passed an unlawful ordinance which stopped the development for six (6) years. The ordinance was characterized by the Pennsylvania Commonwealth Court as "arbitrary and discriminatory." (App. C, p. 60a).

In denying damages, the District Court relied upon the reasoning of Justice Stevens who wrote a concurring

opinion in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, _____ U.S. _____, 87 L.Ed.2d 126, 105 S. Ct. 3108 (1985). The court noted:

> The Due Process clause of the Fourteenth Amendment requires the state to employ fair procedures in the administration and enforcement of all kinds of regulation. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards and health boards generally make a good effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporary harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a 'taking' of private property. *Williamson, supra*, 87 L.Ed.2d at 151 (App. A, p. 18a).

While Justice Stevens does make a valid and logical argument, there are other valid and logical arguments that are to the contrary. The questions presented in this application are fundamental ones which the entire Court should address.

Justice Stevens is correct in his observation that local officials often become involved in controversial matters. Civil rights cases almost always involves controversy for public officials. However, these officials are given good faith immunity that adequately protects their decision making freedom.

This Court has not been reluctant to protect constitutional rights in other areas of governmental activity. Why should an exception be made in the land use area. It is in this area that the danger of local oppression is most likely.

Local government officials often pressured by neighborhood residents. Fearing little more than the vitiation of their improper enactments and the delay and cost of contesting such ordinances and human nature being what it is, combine to form a predictable, chronic and indefensible potential for abuse of governmental power. Local municipalities if exempt from civil rights responsibilities in the land use area are thereby encouraged to become insensitive to constitutional rights and prone to tyrannical, arbitrary enforcement of unreasonable "land use laws" in the name of public morals, health, welfare and safety.

It was to avoid such conditions and consequences that §1983 was enacted.

In the instant case, Pace alleged that the municipality "specifically intended to destroy its development." (App. E, p. 75a). It proved to the Pennsylvania Commonwealth Court not only that the ordinance rezoning its land was arbitrary and discriminatory, but also that it had suffered "tremendous economic detriment." (App. C, p. 59a).

Justice Stevens' argument that "we must presume that regulatory bodies generally make a good faith effort to observe the public interest" and "inevitably become involved in controversies which deprive citizens of constitutional rights . . ." should not represent the basis of denying relief in this case. The intentional abuse of power should not be deemed the inevitable and acceptable product of local governments.

Pace has pled and should be permitted the opportunity to prove that the Defendants did not deserve a presumption of good faith when they intentionally enacted an enforced ordinance designed to cripple and destroy Pace's land.

While it is appropriate to be concerned about the freedom of local governments, there is also a constant need to be concerned about the abuse of governmental power and the unfair advantage that governmental officials can exploit over the owners of land whose proposed use, though lawful, is unpopular.

It is submitted that the opinion of Justice Brennan has provided the correct approach in discussing this issue when he wrote:

> Where a police power regulation is not enacted in furtherance of the public health, safety, morals or general welfare so that there may be no 'public use', although the government entity may not be forced to pay just compensation under the Fifth Amendment, the land owner may nevertheless have a damage cause of action under 42 U.S.C. §1983 (42 U.S.C.S. §1983) for a Fourteenth Amendment Due Process violation *San Diego Gas & Electric Co., supra*, p. 575, n. 23.

Pace has alleged that the officials of Shrewsbury Township intentionally exercised governmental powers to destroy the only industrial development in the Township. The actions of the Township was an abuse of power for which relief should be granted.

In the instant case the District Court found a "taking" of Plaintiff's property by the passage of an unlawful zoning ordinance, but denied relief because the invalidation of the ordinance in the State Court was all Pace was entitled to.

Justice Brennen pointed out in *San Diego* that mere invalidation did not provide adequate constitutional protection:

> Invalidation unaccompanied by payment of damages would hardly compensate the land owner for any economic loss suffered during the time his property was taken. Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the just compensation clause. That guaranty was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole . . . Because police power regulations must be substantially related to the advancement of the public health, safety, morals or general welfare . . . it is axiomatic that the public receives a benefit while the offending regulation is in effect. *San Diego Gas & Electric Co., supra*, p. 575.

The Court of Appeals, following an extraordinary procedure, refused to accept the factual basis of the District Court's opinion. In exercising its "Plenary Power", the Court considered Pace's Complaint insufficient to allege a "taking." While the Court discussed damages in its opinion, it also found the Complaint to be insufficient to allege a claim for damages. An indepth discussion of the propriety of the action by the Court of Appeals is set forth below.

**II. Does a complaint that alleges the enactment of an unlawful zoning ordinance which a township adopted to destroy the only industrial development in the township state a cause of action under 42 U.S.C. §1983 as a violation of the United States Constitution, either as an unlawful taking without just compensation or as a violation of the due process that goes too far?**

Based on the finding of the Pennsylvania Commonwealth Court, the District Court held the zoning ordinance to be both a taking without Due Process and a substantive Due Process violation that "went too far." (App. A, pp. 7a-8a, 15a).

In exercising its Plenary Power, the Court refused to consider the factual Statement of Facts considered by the District Court and purported to limit its review in determining the sufficiency of Plaintiff's Complaint.

In doing so, the Court apparently ignored the modern philosophy of pleading as noted in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S. Ct. 1171 (1979) footnote 11.

> In *Conley v. Gibson*, 355 U.S. 411 . . . (1957), the Supreme Court (explained): 'All the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

The District Court, in its opinion, wrote, "Although Plaintiff merely concludes in the Complaint that the Defendants at this meeting 'imposed administrative burdens, drafted and enacted and enforced

discriminatory, unreasonable and arbitrary regulations that inhibited the industrial development of the Township.' Plaintiff's Brief fleshes these allegations out making it clear that the Commission took the following concrete actions." (App. A, p. 6a).

The same Statement of Facts was before the Court of Appeals in Plaintiff's Brief and in Plaintiff's Appendix a detailed statement of facts presented to the District Court describing and "keyed" to the evidence developed in the State Court proceeding consisting of over 1,000 pages of testimony and many exhibits was marked in the Appendix filed in the Court of Appeals. This same Statement of Facts is appended hereto (App. F, p. 82a).

Normally, an appellate review is based on the record that is submitted to the Court on appeal. While it is recognized that a Court of Appeal cannot generally consider facts which are not part of the record developed in the District Court, *Chick v. Hills*, 528 F.2d 445 (1st Cir. 1976), there appears to be no precedent indicating that a Circuit Court of Appeals can ignore the record that was relied upon by the District Court.

It is submitted that the actions of the Third Circuit Court of Appeals in refusing to consider the Statement of Facts developed by the State Court litigation and included in a Statement of Facts considered by the District Court constitutes such a departure of the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision.

By refusing to accept the record used by the District Court, the Court of Appeals ignored or refused to accept the facts established by Pace, accepted by the District Court and which are essential to a fair determination of the matters appealed.

Even without the full summary considered by the District Court, it is submitted that the Complaint gave adequate notice of Pace's claim that the rezoning of 37 acres constituted a taking which deprived Plaintiff of constitutional rights:

> 37.
>
> The actions of the Defendants deprived the Plaintiff of its rights to market and sell property and constituted the invidious appropriation of Plaintiff's property without making or being required to make just compensation therefore. Plaintiff has been denied the economically viable use of its property and violation of the just compensation clause of the Fifth Amendment.
>
> 38.
>
> The actions of the Defendants constituted an unlawful exercise of their police powers and deprived Plaintiff of its rights and privileges to own, develop and sell property without Due Process of law in violation of the Fourteenth Amendment.
>
> 45.
>
> Plaintiff promptly resorted to the State procedures available to contest the illegal actions of the Defendants. On May 23, 1985, the Commonwealth Court of Pennsylvania ruled §402 of the Township Subdivision Ordinance was not a valid basis to deny approval of the Plaintiff's Plan and *that the rezoning of 37 acres constituted illegal spot zoning bearing no relation to the public health, safety, morals and welfare. The judgment of the State Court is final and the within civil rights action is mature and ripe for consideration.*

These three (3) paragraphs constitute clearly adequate notice of Plaintiff's claim. If the Defendants wanted more information, the Federal Rules of Procedure provided adequate means to discovery any additional information that was necessary.

However, the Court of Appeals apparently felt that paragraph 31 represents an absolute bar to stating a cause of action. Paragraph 31 alleged:

> 31.
>
> On, before and after January 9, 1979, and up to the present, the Defendants adopted the custom and policy of preventing the lawful and reasonable use of Plaintiff's land in Shrewsbury Township. This was done as part of a personal desire to prevent change, keep other citizens out of the Township, to minimize Township services and expenditures and keep taxes down.

Despite the finding by the Commonwealth Court that the adoption of the ordinance was arbitrary and discriminatory, the Appeals Court felt bound by the holding of *Rogen v. Bensalem Township*, 616 F.2d 680 (3rd Cir. 1980) *cert. den.* 450 U.S. 1029 (1981).

*Rogen* apparently permits even unlawful township action so long as that action had a "rational, legitimate foundation."

> The strong language concerning an intent to stop Pace's development is altogether consistent with legitimate actions of a township's legislative body. The Complaint in essence alleges that the Township acted to slow industrial development with knowledge that the value of certain properties, including land owned by Pace, would diminish as a result. The Complaint itself states that the Township responded to public concern by taking steps to 'prevent change, keep other citizens out of the Township, to minimize Township services and expenditures and keep taxes down', App. at 9, thus, it is not alleged that the Township's actions were undertaken out of animosity toward Pace or for any other reasons unrelated to land use planning (App. B, p. 27a).

This conclusion of the Court of Appeals is in direct conflict with the decision of the Pennsylvania Supreme Court which held:

> Zoning provisions may not be used to avoid the increased responsibilities and economic burdens which time and growth invariably bring. A zoning ordinance whose primary purpose is to prevent the intrusion of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities, cannot be held valid. *National Land Investment Company v. Cone*, 419 Pa. 504, 528, 532, 215 A.2d 297 (1965). (Emphasis ours.)

The case by analogy, at least, is also inconsistent with the reasoning of this Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S. Ct. 568 (1977). In that case, this Court held that if a substantial factor or motivating factor for a municipality's decision not to grant tenure to a school teacher was the result of the constitutionally protected conduct of that teacher, then the Board's decision was unlawful unless the Board could show that there was another substantial factor for reaching the decision in the absence of the protected conduct. Thus, if the motivating factor for a governmental decision is to accomplish an unlawful end, then the government decision cannot be cured by some otherwise valid motives which are not the substantial factor for the decision.

It is not an abuse of governmental power to adopt a zoning ordinance which was designed to immediately and specifically destroy Pace's development? While there are other arguable purposes served by the legislation, that could be described as "rational", is it constitutionally permissible to ignore the motive of the local officials?

Does Pace have the insurmountable burden of showing both that the sole purpose of the enactment was to destroy the development and that there were no other possible valid purposes?

The Court of Appeals seems to answer these questions by concluding that even if the amendments were designed to cripple and destroy Pace's development, there is no damage relief available. If the Township officials were motivated by rational, legitimate reasons, their unlawful exercise of power cannot be considered an "abuse of power" to permit the recovery of damages as a substantive Due Process violation of the Fourteenth Amendment.

The Appeals Court found that because there were some possible rational reasons for the adoption of the unlawful ordinance, that the Complaint merely reflected a dispute over legislative judgment on issues of land use planning (App. B, p. 50a).

It is submitted that this Court should determine whether the test of liability under 42 U.S.C. §1983 throughout the United States in land use litigation is the *Rogen* test promulgated by the Third Circuit, *i.e.*

> Under the Due Process clause we defer legislative judgment (including the adoption of unlawful ordinances) unless it can have *no rational, legitimate foundation.* (App. B, p. 50a). (Bracketed comments and emphasis added.)

The *Rogen* test places the emphasis not upon reviewing the effect of the governmental action on constitutional rights, but rather upon protecting the local government from constitutional scrutiny so long as their conduct is "rational" and "legitimate."

*Rogen* also holds that amendments of a zoning ordinance is a legislative act rather than an administrative act and as such is not subject to requirements of procedural Due Process. *Rogen v. Bensalem Township, supra*, p. 693. For this reason Pace, whose land was solely affected by the zoning amendment, was never given an opportunity to know, in fact, about the Township's legislative planning and its activity to change the zoning on the tract (App. F, p. 88a).

If *Rogen* also holds that a zoning ordinance is not subject to the requirements of *substantive Due Process* where the ordinance is "rational and legitimate", the potential for abuse of power by governmental officials would seem to be unlimited. This is only another way of saying the end justifies the means. Constitutional rights would have little meaning if they do not exist when the government's "motives" are rational and legitimate. Such a rule clearly overrules *Daniels v. Williams*, 474 U.S. _____, 88 L.Ed.2d 662, 106 S. Ct. 622 (1986).

In any event, the area is dramatically impacted by the *Rogen* test and there is a need for guidelines by this Court. This case provides the Court with the opportunity to establish a clear statement of constitutional law on the question of what motives, if any, will cure otherwise unlawful legislative actions of municipal officials in land use cases.

The State Court decision finding the rezoning to be arbitrary and discriminatory was accepted by the District Court as a "taking" on both of Pace's theories.

The allegations, together with the State Court decision that held the rezoning to be an invalid exercise of police power, squarely meets the criteria for a Due Process taking described by Justice Brennan in *San Diego Gas & Electric Company v. San Diego, supra,* p. 575, note 23:

> A different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals and general welfare so that there may be no public use. Although the government entity may not be forced to pay just compensation under the Fifth Amendment, the land owner may nonetheless have a damage cause of action under 42 U.S.C. §1983 (42 U.S.C.S. §1983) for a Fourteenth Amendment Due Process violation.

Justice Holms also writing on the subject, stated: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393, 415 (1922). When the police power is abused, as in this case, by enactments that go beyond a legitimate exercise of that power the regulation "goes too far."

The Complaint stated a cause of action under 42 U.S.C. §1983. The application for certiorari should be granted.

## Conclusion

By adopting an unlawful ordinance held to be arbitrary and discriminatory by the Pennsylvania Court of Appeals, the Township of Shrewsbury abused the legislative process. Their alleged rezoning of Pace's 37 acres had no relationship whatsoever with the police powers granted to them by the Pennsylvania legislature. Under the circumstances it is submitted that the ordinance constituted a taking both in violation of the Fifth Amendment as a taking without just compensation and as a regulation that went too far and violated substantive Due Process.

Under the circumstances, Pace has suffered constitutional violations for which compensation should be provided under 42 U.S.C. §1983. In addition, the issues set forth herein represent issues that have been presented to the Court on prior occasions, but which were not answered and which are now ripe for determination. The application for Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**District Court Opinion**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PACE RESOURCES, INC.

VS.

SHREWSBURY TOWNSHIP, *ET AL.*

CIVIL NO. 81-0327

DISTRICT COURT ORDER DISMISSING
PLAINTIFF'S CAUSE OF ACTION AND ENTERING
JUDGMENT IN FAVOR OF
SHREWSBURY TOWNSHIP

*Appendix A—District Court Opinion.*

IN THE UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

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Per. Donald R. Berry
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PACE RESOURCES, INC.,
*Plaintiff,*

vs.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NIELSEN, RICHARD M. GRIM, RONALD McKAY and LARRY C. SPANGLER,
*Defendants.*

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*MEMORANDUM*

Plaintiff in this case seeks damages for the economic harm caused it by an alleged temporary "taking" of its land by defendants, and by an alleged conspiracy by defendants to deprive it of its right to pursue a legitimate business enterprise. The circumstances of the case arise out of a dispute between plaintiff and the defendant township over the disapproval of a subdivision plan for an industrial park.

On March 11, 1981, plaintiff filed this action seeking relief for various alleged constitutional violations under section 1981, 1983, and 1985 of the Civil Rights Act, 42

U.S.C. §§1981, 1983 and 1985. Defendants filed a timely motion to dismiss, and on July 15, 1982, the United States Magistrate assigned to the case recommended that the District Court abstain. On August 24, 1982, this court issued an order staying the proceedings in this case pending the outcome of a related appeal of a zoning hearing board decision in the state courts. That litigation came to an end in May, 1985.

On August 26, 1985, plaintiff filed an amended complaint, and defendants responded with the instant motion to dismiss. Plaintiff's new complaint, based on sections 1981 and 1983 of the Civil Rights Act, once again alleges a conspiracy by defendants to deprive plaintiff of its right to pursue a legitimate business enterprise. The complaint also cites the Pennsylvania Commonwealth Court's decision in the state case that declares an attempted re-zoning by defendant township invalid as spot zoning, and claims damages for the interim "taking" effected by the invalid zoning ordinance.

Defendants move to dismiss on abstention grounds and on the grounds that plaintiff has failed to state a claim upon which relief can be granted. They argue that plaintiff has not successfully plead a constitutional violation, and that the injunctive and declaratory relief sought are inappropriate since the state court has already, in effect, granted such relief.

## *I. ABSTENTION*

We have already abstained once in this proceeding. We must now decide whether continued abstention is warranted. After reviewing the case law and the

arguments of the parties, we conclude that abstention would no longer be appropriate.

The state court proceeding is virtually at an end, and the major issue presented to us now is the availability of damages to plaintiff. This relief was not and is not available in the state court proceedings. *See, Kaiser v. Horsham Township,* 72 Pa. Cmwlth Ct. 16, 455 A. 2d 782 (1983) (no reverse condemnation award allowed under state law for "taking" caused by a regulatory ordinance). *See also, Williams v. Red Bank Board of Education,* 662 F. 2d 1008, 1023 (3d Cir. 1981) ("As a matter of the proper exercise of the federal courts' jurisdiction, we cannot justify dismissing a claim for constitutional damages and consequent attorney's fees when the state forum is unable, as it is here, to grant that relief"). We will therefore address defendant's motion to dismiss on the merits.

## *II. FACTUAL BACKGROUND*

In addressing a motion to dismiss, this court must accept as true all well-pleaded allegations of fact contained in the complaint and must construe the complaint favorably to the pleader. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). Plaintiff in his complaint alleges the following facts.

The plaintiff is owner of a tract of land consisting of approximately 15 acres in Shrewsbury Township, Pennsylvania. Defendants are the township itself, and members of the township's board of supervisors and planning commission. In early 1973, Pace Resources sought approval from the township of a preliminary subdivision plan for the proposed Southern Industrial

Park, to be built on Pace's 145 acre tract. On April 2, 1973, the planning commission approved the preliminary subdivision plan. At that time, Shrewsbury Township had no zoning ordinance and no comprehensive plan for development.

On July 9, 1973, the Township approved a final subdivision plan for lots 1, 2, 22, 23, 26 and 27 out of the forty-seven proposed lots. Over a year later, by resolution of August 19, 1974, the Township halted all further development of the proposed industrial park until a public sewer system could be constructed to serve the park. The Township pledged, at that time, to endeavor to obtain sewer service to the park. On September 24, 1974, the planning commission approved a re-submitted preliminary plan for lots 28 through 47, and later, in 1977, the Township approved by default the final plan for lots 6, 17, 18, 19, 20 and 21.

Meanwhile, in 1976, Shrewsbury Township adopted a zoning ordinance and comprehensive plan. Pace Resources' 145 acre tract was zoned for industrial use.

In November 1978, according to plaintiff's complaint, "it became apparent" that Pace Resources would be permitted to bring sewer service to the Southern Industrial Park. At about this time, area residents began filing objections to the industrial park with the planning commission members and the Township board of supervisors. Although plaintiff does not mention the fact in its complaint, plaintiff stresses in its brief that one of the planning commission's member's wives circulated a petition opposing the development. As a result of the complaints and petitions, the planning commission agreed in November, 1978, to consider re-zoning Pace Resources' tract from industrial to agricultural or conservation use.

On January 9, 1979, according to the vague allegations of the complaint as clarified by plaintiff's brief, the Township supervisors and planners met to consider changes to the zoning ordinance. Although plaintiff merely concludes in the complaint that the defendants, at this meeting, "imposed administrative burdens, drafted and enacted and enforced discriminatory, unreasonable and arbitrary regulations that inhibited the industrial development of the township," plaintiff's brief fleshes these allegations out, making it clear that the commission took the following concrete actions (*see* Plaintiff's brief at Exhibit B, pp. 8-11 and Plaintiff's complaint at paragraph 44 and paragraph 45). First, the commission proposed rezoning thirty-seven acres of Pace's 145 acre tract from industrial to agricultural to act as a buffer zone. Second, the commission proposed amendment of the zoning ordinance to require that a special exception be obtained for industrial use of land in an industrial park. Finally, the commission proposed special performance standards to be met by any developer seeking a special exception for use of land in an industrial park. These performance standards included the requirements that the applicant prove that an adequate water supply exists for the proposed use, that there is suitable highway access to the site, and that the buildings will be suitably designed and landscaped.

These proposed amendments to the zoning ordinance were passed on March 12, 1979. Plaintiff challenged these amendments in state court, and on May 23, 1985, the Commonwealth Court of Pennsylvania ruled that the requirement of proving an adequate water supply was too vague under state law to serve as a reason for

rejecting a subdivision plan. *Pace Resources, Inc. v. Shrewsbury Township Planning Commission*, Nos. 864 C.D. 1984, 991 C.D. 1984, No. 863 C.D. 1984, 990 C.D. 1984, slip op. (Pa. Cmwlth Ct., May 23, 1985). The Commonwealth Court, in the same opinion, also ruled that re-zoning of thirty-seven acres from industrial to agricultural use "constituted arbitrary and unjustifiably discriminatory zoning." *Id.* at 8.

Plaintiff's theory of recovery, based on the above factual allegations, is twofold. First, plaintiff argues that the actions of defendants deprived plaintiff of the use of its property and "constituted the invidious appropriation of [p]laintiff's property without making or being required to make just compensation therefore." Complaint at paragraph 37. This theory of recovery is based on an alleged violation of the just compensation clause of the fifth amendment to the constitution.

Plaintiff's second theory is that defendants' actions constituted an unlawful exercise of their police power and were therefore violative of substantive due process. In other words, defendants' actions were arbitrary and without a rational basis and therefore deprived plaintiff of property without due process of law.

## *III. THE FIFTH AMENDMENT VIOLATION*

We have no doubt that re-zoning the thirty-seven acre industrial tract to agricultural use was illegal and beyond the power of the planning commission absent a declaration of taking and just compensation. Indeed, we cannot hold otherwise. The Commonwealth Court of Pennsylvania has already ruled that the rezoning was "arbitrary and unjustifiably discriminatory," and that

there was no "substantial relationship between the rezoning of 37 acres of Pace's land and the public health, safety, morals or welfare." *Pace Resources, supra,* slip. op. at 6 and 8.

We also have no doubt that this type of arbitrary regulation of property can amount to a "taking:"

> Regulation of property use may be so oppressive or arbitrary that it crosses the wavering line separating a valid exercise of the police power from an exercise of the eminent domain power, which would be invalid without payment of the just compensation mandated by the due process clauses of the Fifth and Fourteenth Amendments.

*Pamel Corp. v. Puerto Rico Highway Authority,* 621 F.2d 33 (1st Cir. 1980), citing, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). *See also, Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) ("The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests. . ."). We do not, however, believe that such an invalid regulatory action-turned-taking can be compensated for by a federal court award of damages.

As far as we have been able to determine, there is only one federal appeals court that has awarded damages against a local government in the context of a regulatory taking. In *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission,* 729 F.2d 402 (6th Cir. 1984), reversed, 105 S. Ct. 3108 (1985), the sixth circuit Court of Appeals held that the application of otherwise valid zoning regulations to the plaintiff's land deprived the property of an economically viable use and

hence effected a compensable taking. The sixth circuit based its ruling on a four justice dissent in the case of *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981). In that case, the majority of the Supreme Court did not reach the issue of whether damages are an available remedy in a regulatory taking case. The dissenting Justices, however, lead by Justice Brennan, opined:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

*Id.* at 653.

Since deciding the *San Diego Gas & Electric Co.* case in 1981, the Supreme Court has had a second opportunity to address the availability of damages in a regulatory taking case. In granting certiorari to review the sixth circuit's holding in *Hamilton Bank of Johnson City, supra,* the Supreme Court intended to "address the question whether federal, state and local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 105 S. Ct. 3108, 3116 (1985). Upon closer examination, however, a majority of the Court found that the question was not properly presented and that plaintiff's claim for damages in federal court was premature.

Because the Supreme Court has not yet definitively ruled on the availability of damages in regulatory taking cases, we are left to decide between the approach of the sixth circuit which indicated in the *Hamilton Bank* case that damages are available, and the approach embodied in a series of first circuit cases which denies damage awards. We believe the first circuit approach is the better and more constitutionally sound approach. As the court noted in *Pamel Corp. v. Puerto Rico Highway Authority,* 621 F.2d 33 (1st Cir. 1980),

> Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The Federal constitutional right can be secured to the individual without forcing the state to purchase his property. Voiding the offending restriction will make the owner whole . . . Moreover, once the constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits of the restriction are worth the cost of the required compensation.

*Id.* at 36. Under this approach, federal courts may enjoin the enforcement of unconstitutional or confiscatory ordinances or regulations, but they may not award damages. *Citadel Corp. v. Puerto Rico Highway Authority,* 695 F.2d 31, 34 (1st Cir. 1982), *cert. denied,* 464 U.S. 815 (1983).

In the instant case, plaintiff asks for both damages to compensate for the taking caused by the rezoning, and an injunction against enforcement of the zoning

ordinance. We decide today that damages are not available, and, in this case, because the state court system has already declared the ordinance invalid and unenforceable, we cannot, out of consideration of res judicata and comity, enjoin the enforcement of the ordinance. Indeed, there should no longer be a need for such an injunction,[1] and if there is, it is more properly sought in state court in the form of an order enforcing the state court's own decisions and orders.

## *IV. THE DUE PROCESS CLAIMS*

Plaintiff's second theory of recovery based on the facts alleged in the Complaint and stated more specifically in its brief is that defendants' actions constituted an unlawful exercise of their police powers and were therefore violative of plaintiff's due process rights.

Upon examination of the alleged facts, we find no violation of plaintiff's procedural due process rights. Amendment of a zoning ordinance is a legislative act, rather than an administrative act, and as such, is not subject to the requirements of procedural due process. *Rogin v. Bensalem Township*, 616 F.2d 680, 693 (3d Cir. 1980). Further, we cannot find that plaintiff suffered a deprivation of procedural due process in the application of the various ordinances and regulations to its proposed industrial park development. In *Rogin*, the third circuit court of appeals evaluated Pennsylvania's statutory procedure for challenging zoning ordinances and their application and found that it "substantially conforms

[1] Defendants concede in their brief in support of their motion to dismiss that "while Pace's ability to use the thirty-seven acres for industrial purposes was precluded during the pendency of the appeal proceeding, it is now free to make industrial use of this land."

with the general due process guidelines enunciated by the Supreme Court." *Id.* at 695. Plaintiff acknowledges that it has submitted to this process; indeed, on review, the Commonwealth Court granted plaintiff the relief it requested. Additionally, plaintiff has made no specific allegations that the procedures followed during the appeals process from the zoning hearing board through the Court of Common Pleas to the Commonwealth Court deviated in any way from the statutorily prescribed procedures. We therefore hold that, under the facts as plaintiff alleges them, plaintiff suffered no deprivation of its procedural due process rights.

Plaintiff also alleges denial of its substantive due process rights. The gravamen of this claim appears to be that the Township and its officers used existing ordinances and the new amendments to the zoning ordinance to "cripple and destroy" the industrial development, not out of any rational concern for the health, safety, and welfare of Township residents, but rather out of "a personal desire to prevent change, keep other citizens out of the Township, to minimize Township services and expenditures and keep taxes down." Complaint at 31.

In evaluating plaintiff's claim that the zoning ordinance as applied to the proposed industrial park violated plaintiff's substantive due process right to pursue a legitimate business enterprise, we must keep in mind that "the test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest," *Rogin, supra,* 615 F.2d at 689.

> "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it," . . . [T]he focus of due process analysis is . . . whether it was irrational for the Township to have passed the law at all and to have applied it to [the developer].

*Id.*, quoting *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955).

Plaintiff implies in its brief that we are bound by the language of the Commonwealth Court opinion to find here that defendants' actions were not rationally related to any interest the township may have had in protecting the health, safety or general welfare of its residents. Plaintiff is only half right. It is true that a "judgment in [a] prior action operates as an estoppel . . . 'as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' " *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). It is also true, however, that if there is any uncertainty as to which of several grounds a judgment was rendered on, "the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russel v. Place*, 94 U.S. 606, 608 (1877).

As we noted earlier, the Pennsylvania Commonwealth Court in its opinion addressed the claims that the requirement of proving an adequate water supply was overly vague, and that the rezoning of the thirty-seven

acres from industrial to agricultural use was illegal spot zoning. It is fairly clear that, on this latter claim, the Commonwealth Court based its judgment on the finding that the Township "failed to show any substantial relationship between the rezoning of 37 acres of Pace's land and the public health, safety, morals, or welfare." *Pace Resources, Inc. v. Shrewsbury Township Planning Commission, supra,* slip op. at 6. We are bound by this finding and by the concomitant holding that rezoning the thirty-seven acres was illegal, "arbitrary and unjustifiably discriminatory."

The Commonwealth Court made no such holdings or findings with respect to plaintiff's other claims in the instant action. Although the court did address plaintiff's allegation that the water supply ordinance was overly vague, it did not include that the ordinance was without a rational basis. Rather, it decided that

> The idea of providing an "adequate" water supply and the installation of such systems so as not to "endanger or decrease" ground water supplies of adjacent land are insufficient standards by which to deny a proposed subdivision. "[T]here is no statutory authority to permit such nebulous reasons to defeat a subdivision plan." *Brauns v. Swarthmore Borough,* 4 Pa. Commonwealth Ct. 626, 635, 288 A.2d 830, 834 (1972).

*Pace Resources, Inc. v. Shrewsbury Township Planning Commission, supra,* slip op. at 4. In other words, the Commonwealth Court simply ruled that under *state* law, citation to the ordinance did not provide a sufficiently specific reason for denying approval of a subdivision

plan.[2] Further, the Commonwealth Court did not address at all plaintiff's current contention that amending the zoning ordinance to require a special exception for industrial use of land in an industrial park is without a rational basis, or its contention that the performance standards requirements of proving suitable highway access and suitable design and landscaping are without a rational basis. We may therefore address these claims on our own, unfettered by any prior holdings of another court.

In making the determination whether plaintiff has stated a cause of action for denial of its substantive due process rights with respect to the special exception, water supply, and performance standards portions of the ordinances in question, we must be guided by the third circuit's decision in *Rogin v. Bensalem Township, supra.* In that case, the district court decided on a motion to dismiss, and the circuit court agreed, that "the Township has a legitimate interest in controlling population growth and density and the zoning amendments are a rational and reasonable means to accomplish that purpose." *Id.* at 689. In this case, the special exception process can be justified on the grounds that the Township wished to control the growth and density of the population as well as the growth of industry in the area. Further, it is well-settled that

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[2] The first circuit has held, and we agree, that "whereas here—the state has erected a complex statutory scheme and provided for avenues of appeal to the state courts, property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes." *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822, 832, fn. 9 (1st Cir.), *cert. denied,* 459 U. S. 989 (1982).

> [t]he concept of general welfare has been broadly construed: "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the powers of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

*Rogin, supra,* 616 F.2d at 688, quoting, *Berman v. Parker,* 348 U.S. 26, 33 (1954). Under these standards of rationality, the plaintiff in this case cannot, as the developer in the *Rogin* case could not, succeed with its substantive due process claim. As the court in *Rogin* ruled, the officials of the Township in the instant action legitimately could have concluded that it was in the best environmental and economic interests of Shrewsbury Township to carefully restrict the amount and type of industrial development in the Township, to assure an adequate water supply for all residents and industries in the Township, to regulate traffic flow to and from industrial areas, and to require an aesthetically pleasing environment within local industrial parks. Absent any allegations that the Township's actions were in any way exclusionary or discriminatory on the basis of race or some other suspect classification, or that they deprived plaintiff of a specially protected right, we cannot find that these amendments to the zoning ordinance and their application to plaintiff in any way violated plaintiff's substantive due process rights.

As we noted earlier, we are bound by the holding in the Commonwealth Court's opinion that the rezoning of the thirty-seven acres from industrial to agricultural use was "arbitrary and unjustifiably discriminatory." This holding leads to the inevitable conclusion that this act of

rezoning violated plaintiff's substantive due process rights. Our inquiry cannot end here, however. Defendants' motion to dismiss alleges that plaintiff has not stated a claim upon which relief can be granted. Although we acknowledge that plaintiff has stated a claim, we do not find that plaintiff is entitled to any more relief than has already been granted.

The Commonwealth Court declared the rezoning illegal. It also reversed the Court of Common Pleas and remanded for action in accordance with its holding. Essentially, plaintiff has already won a declaratory judgment that the zoning amendment is illegal. Defendants concede in their brief that plaintiff is now "free to make industrial use" of the thirty-seven acres that had been rezoned for agricultural use. It would therefore appear that there is no longer any need for an injunction. The only relief that plaintiff has not yet received is damages.

We hold that, in this situation, damages is an inappropriate remedy for the temporary illegal rezoning of plaintiff's land. This holding is born of a concern for the governing and decision-making freedom of our local governments. Justice Stevens in his concurring opinion in the *Williamson Co. Regional Planning* case, *supra*, referred to such a temporary illegal rezoning as a temporary harm that is "a by-product of governmental decisionmaking." *Id.*, 105 S.Ct. at 3126. These "by-product" harms should not, according Justice Stevens, be compensable whether they are characterized as a result of a taking or as a result of denial of substantive due process.

> If [a property owner's] property is harmed—even temporarily—without due process of law, he may have a claim for damages based on the denial of his procedural rights. But if the procedure that has been employed to determine whether a particular regulation "goes too far" is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.

*Id.* at 3126-27. Justice Stevens continued:

> The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the Government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable byproduct of every such dispute as a "taking" of private property.

The only available remedy, according to Justice Stevens, is invalidation of the offending ordinance. We agree, and therefore hold that plaintiff has failed to state a

substantive due process claim for which relief can be granted with respect to the illegal rezoning of the thirty-seven acre tract.

*V. THE §1981 CLAIM.*

As we have alluded to above, plaintiff has failed to state a cause of action under 42 U.S.C. §1981 because it has failed to make a claim that it has been discriminated against on the basis of race. *See, Bell v. Brennan,* 571 F. Supp. 1116 (E.D. Pa. 1983).

*VI. CONCLUSION.*

We have decided that plaintiff has failed to state a claim upon which relief can be granted after viewing plaintiff's complaint in the light most favorable to plaintiff. We therefore grant defendants' motion to dismiss.

An appropriate order will be entered.

R. Dixon Herman
R. DIXON HERMAN
*United States District Judge*

Dated: Mar. 17th 1986

*Appendix A—District Court Opinion.*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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PACE RESOURCES, INC.,

*Plaintiff,*

vs.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NIELSEN, RICHARD M. GRIM, RONALD McKAY, and LARRY C. SPANGLER,

*Defendants.*

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CIVIL NO. 81-0327

FILED
HARRISBURG, PA
MAR 17 1986
PER. DONALD R. BERRY (DRB)
DEPUTY CLERK

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ORDER

AND NOW, this 17th day of March, 1986, IT IS ORDERED that defendants' motion to dismiss be and is hereby granted.

The Clerk of Court is directed to close the file.

R. Dixon Herman
R. DIXON HERMAN
*United States District Judge*

# APPENDIX B

## Appeals Court Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5210

PACE RESOURCES, INC.

VS.

SHREWSBURY TOWNSHIP, *ET AL.*

THIRD CIRCUIT COURT OF APPEALS OPINION
AFFIRMING THE DISTRICT COURT DISMISSAL
OF PACE'S COMPLAINT

*Appendix B—Appeals Court Opinion.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 86-5210

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PACE RESOURCES, INC.,

Appellant

vs.

SHREWSBURY TOWNSHIP,
O'KEEFE, JOHN J.
NACE, CLARENCE E.
DUTTON, JOHN D.
MALONE, GILBERT G.
SOLOMON, WILLIAM J.
NIELSEN, CARL
GRIM, RICHARD M.
McKAY, RONALD and
SPANGLER, LARRY C.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA - SCRANTON
(D.C. NO. 81-0327)

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ARGUED SEPTEMBER 17, 1986

BEFORE: ADAMS* and STAPLETON, *Circuit Judges*
and COWEN, *District Judge***

(Opinion Filed: JANUARY 12, 1987 )

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* Honorable Arlin M. Adams, United States Circuit Judge, was present at oral argument but did not participate in the decision.

** Honorable Robert E. Cowen, United States District Judge for the District of New Jersey, sitting by designation.

Donald L. Reihart (Argued)
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York, Pennsylvania 17401

Attorney for Appellees

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*OPINION OF THE COURT*

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STAPLETON, *Circuit Judge*:

In this civil rights action, Pace Resources, Inc. ("Pace") seeks to recover damages for the alleged loss of use of a parcel of real estate owned by it in Shrewsbury Township ("the Township") during a period in which it successfully challenged certain land use restrictions of the Township in a state proceeding. Pace alleges that the Township's restrictions on land use have violated the taking clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment and that the Township, accordingly, should be held accountable for the economic consequences of the delay occasioned by the Township's promulgation and enforcement of these restrictions. The district court granted the defendants' motion to dismiss. We affirm.

I.

Pace purchased a 145.61 acre tract of land in Shrewsbury Township in May of 1965 for $75,000. Since that time, Pace has attempted to develop an

industrial park on this land. In 1973, the Township's Board of Supervisors approved a preliminary development plan for the entire tract and a final plan for six of the 47 proposed lots. These six lots sold promptly and the buyers have erected buildings on four of the six.

In November, 1976, the Township adopted a zoning ordinance and comprehensive plan for land use. The Township zoned all of Pace's land for industrial use. Shortly thereafter, Pace's final plans for an additional six lots received approval. Two years later, however, Township residents raised concerns about possible harmful effects of continued industrial development in their community. The Shrewsbury Township Planning Commission and the Board of Supervisors agreed in November, 1978, to reevaluate the zoning ordinance.

Pace submitted a final development plan for its remaining lots on December 5, 1978. On January 9, 1979, the Board of Supervisors and Township planners reviewed the zoning ordinance and devised proposed amendments. The Township rejected Pace's 1978 final development plan on either January 12 or February 7, 1979, relying on defects in the plan under the 1976 zoning ordinance. In particular, the Township found the plan deficient because it did not survive scrutiny under Section 402 of the ordinance, which allowed approval of on-lot water supply systems only where "the water supply yield is adequate for the type of development proposed" and "the installation of such systems will not endanger or decrease ground water of properties adjacent to the land development," App. at 33. Pace resubmitted a modified version of its plan at a March 7, 1979, joint meeting of the Board of Supervisors and the Township Planning Commission. The plan was again rejected.

On March 12, 1979, the Board of Supervisors adopted the proposed amendments to the zoning ordinance. The amendments rezoned 128 acres from industrial to agricultural and other designations, including 37 acres owned by Pace that were rezoned agricultural. The amendments also established a mandatory special exception procedure for industrial development of land in an industrial park. The amended ordinance requires an applicant for a special exception to show compliance with certain performance standards, one of which is the same adequate water supply requirement set out in the first ordinance at Section 402. The zoning ordinance amendments adopted on March 12, 1979, included numerous other changes in the original ordinance.

On August 6, 1979, Pace initiated a proceeding before the Township's Zoning Hearing Board, contesting rejection of its final plan and challenging the validity of certain provisions of the amended ordinance. The Board's rejection of Pace's contentions led to an appeal and ultimately resulted in a May 23, 1985, Commonwealth Court decision that found the rezoning of Pace's 37 acres to be illegal spot zoning. The court further found that Section 402's adequate water supply requirement (as well as the similar requirement in the amended ordinance) was too vague to meet the requirements of Pennsylvania's Municipalities Planning Code.

Upon termination of the state court proceedings, the matter was remanded to the Township Board of Supervisors with a direction that it grant or deny approval of the plans submitted by Pace in December of 1978 based solely on the ordinance in effect at that time, with Section 402 deleted. App. at 37, 108, 112. Thus, Pace, since the close of the state court proceedings, has had the right to have its 1978 plan processed under the law as it existed prior to the

actions of which it here complains. Significantly, Pace's amended complaint does not allege any wrongful denial of approval following the remand to the Board of Supervisors. In addition to the right to seek approval under the old law, Pace has had the right since May 23, 1985, to develop all of its land for industrial use pursuant to a new plan, submitted for approval under the provisions of the new ordinance, disregarding Section 402 and the rezoning of the 37 acres.

In this federal action, Pace seeks monetary and injunctive relief based on allegations that Township officials, by rejecting Pace's plans and amending the zoning ordinance, have effected a taking of Pace's property and have deprived Pace of property without due process of law. The district court dismissed the suit for failure to state a claim upon which relief could be granted. To evaluate properly Pace's claims for relief under the Constitution and 42 U.S.C. § 1983, it is necessary first to examine carefully the allegations of Pace's complaint and to review the state court decisions.

A. *Pace's Allegations*

The Pace amended complaint states that "after January 9, 1979, and up to the present, the Defendants adopted the custom and policy of preventing the lawful and reasonable use of Plaintiff's land in Shrewsbury Township." App. at 9. Pace further alleges that "the Defendants imposed administrative burdens, drafted and enacted and enforced discriminatory, unreasonable and arbitrary regulations that inhibit the industrial development in the Township" and that "Defendants specifically conspired to use their official governmental positions and offices to cripple and destroy Plaintiff's industrial development." App. at 9-10. In addition, Pace states that it "has been denied the economically viable use of

its property in violation of the just compensation clause of the Fifth Amendment." App. at 11.

These characterizations of the activities of the Township's officials need to be considered in context. First, the allegations are conclusory. The complaint contains no factual allegations supporting some of the sweeping conclusions that otherwise might be legally relevant. Thus, for example, while the complaint refers to "discrimination", it fails to identify any similarly situated property that was treated differently. As we have held on a number of occasions, such conclusory allegations cannot be accepted at face value in this area of the law. *See, e.g., Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976); *Boykins v. Ambridge Area School Dist.*, 621 F.2d 75 (3d Cir. 1980). The economic drain of civil rights litigation on public resources is simply too great to permit cases to go forward without a more substantial indication that a constitutional violation may have occurred.

Second, the strong language concerning an intent to stop Pace's development is altogether consistent with legitimate actions of a township's legislative body. The complaint in essence alleges that the Township acted to slow industrial development, with knowledge that the value of certain properties, including land owned by Pace, would diminish as a result. The complaint itself states that the Township responded to public concern by taking steps "to prevent change, keep other citizens out of the township, to minimize township services and expenditures and keep taxes down." App. at 9. Thus, it is not alleged that the Township's actions were undertaken out of animosity toward Pace or for other reasons unrelated to land use planning. As Pace candidly conceded at oral argument, this conduct would have occurred regardless of who owned Pace's property so long as they were planning to use the land in the same way. Moreover, there is no

allegation that the regulators acted for personal financial gain.[1] Accordingly, this case is far removed from the situation that this Court faced in *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3d Cir. 1982), *cert. denied*, 456 U.S. 990 (1982) (allegations that public officials conspired to put plaintiff out of business for private reasons applicable only to him state civil rights claim under due process clause).

Finally, Pace's broad, conclusory allegations must be read together with the complaint's statement that Pace's 37 acres retained a value of $52,000 after the Township zoned them agricultural. This substantial retained value demonstrates that Pace seeks relief because it has been denied *the most desirable use* of this land, not because it has been denied *all use* of its property.

B. *The Pennsylvania Litigation*

The Zoning Hearing Board dismissed Pace's claims on December 22, 1980. Pace then appealed to the Court of Common Pleas of York County. In its opinion that court concluded *inter alia* that the rezoning did not constitute special legislation, spot zoning, or a taking. The court stated:

> Pace has failed to meet its heavy burden of establishing [that] the amendatory ordinances were specifically directed against its property or that they bear no relationship to the general welfare of the community. Therefore, we do not

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1 At oral argument, Pace's counsel asserted that the wife of one of the members of the Planning Commission owned an interest in property affected by the 1979 amendments. We find no such allegation in the complaint, much less an allegation that this property was treated differently than other similarly situated properties.

> find that the decision of the Zoning Hearing Board of Shrewsbury Township was arbitrary, capricious or an abuse of discretion on the issue of "special legislation."

App. at 121-122. With respect to Pace's spot zoning argument, the court found as follows:

> To prove the contention that the 1979 amendments constitute "spot zoning," Pace must again overcome the presumption of validity accorded the 1979 amendments and clearly establish the provisions of the amendment are arbitrary and unreasonable and have no relation to the public health, safety, morals and general welfare. . . .
>
> . . .
>
> Taken separately or collectively, we do not find Pace's arguments supporting its "spot" zoning challenge so compelling and beyond debate to enable us to invalidate the rezoning on this ground.
>
> We conclude that Pace has failed to prove the different treatment accorded its 37 acre tract is "unjustifiable." Therefore, we hold that the Zoning Hearing Board did not err or abuse its discretion when it concluded there was a reasonable basis for the rezoning.

App. at 135, 140. Addressing the claim of a taking without just compensation, the court concluded:

> Suffice it to say that with respect to this issue, a general principle of zoning law is that all zoning has some economic impact on the land affected by the zoning. *See Swade v. Springfield Township, Zoning Board of Adjustment*, 392 Pa. 262, 140 A.2d 597 (1958). Even designated as agricultural

> land. Pace's land retains some value. Therefore, we find that there has been no taking of Pace's land without just compensation in derogation of the Fifth and Fourteenth Amendments to the United States Constitution.

App. at 140-141.

The only one of Pace's claims accepted by the York County court concerned Section 402 of the first ordinance and the similar water supply standard of the new special exception procedure. Finding the special procedure on the whole "valid and constitutional," App. at 129, the court nevertheless concluded that the water supply language of both the new and old ordinances "provide[s] no standard on which a landowner-developer can rely to comply with the law." App. at 132-33. The court invalidated the water supply standard as "unconstitutionally vague." App. at 134.

Both the Township and Pace appealed to the Commonwealth Court of Pennsylvania. That court affirmed the finding that the water supply standard was void for vagueness but relied on statutory rather than constitutional grounds. In addition, the court reversed the Court of Common Pleas with respect to the spot zoning challenge. Reasoning that the Township had the burden of proof rather than Pace, the court concluded:

> In the instant case, the size of the rezoned area, 37 acres, is considerably larger than other areas found by our courts to be the object of spot zoning. *See Glorioso Appeal*, 413 Pa. 194, 196 A.2d 668 (1984); *French v. Zoning Board of Adjustment*, 408 Pa. 479, 184 A.2d 791 (1962). However, even relatively large tracts of land can in fact be a spot zone. In *Commercial Properties, Inc. v. Peternel*, 418, Pa. 304, 311, 211 A.2d 514, 519 (1965), our Supreme Court stated that: "It makes no difference

whether it is a one-quarter acre lot or a 50 acre industrial complex which is the subject of the rezoning. If it is aimed at preventing a theretofore legal use of an integrated unit owned by one common interest, the action cannot be supported as valid rezoning." Similarly, in *Appeal v. Benech*, 28 Pa. Commonwealth Ct. 415, 368 A.2d 828 (1977), we held that a rezoned parcel of 80 acres was a spot zone.

The Township, in this case, has failed to show any substantial relationship between the rezoning of 37 acres of Pace's land and the public health, safety, morals, or welfare. The rezoning of Pace's land to "agricultural" was accomplished by the Board of Supervisors in only an hour from the introduction of the Ordinance to its final passage. This differs sharply from the prior zoning scheme which was the product of months of planning, studies, and meetings. In fact, the record indicates that this change was prompted by a petition from area residents requesting such a change, and that the circulator of the petition was the wife of one of the Planning Commissioners.

The stated intent of the Planning Commission and the Board of Supervisors was to preserve the rural nature and agricultural integrity of the Township. However, as a result of this rezoning and other zoning changes made, the agricultural land was actually reduced from 69.4 percent to 68.6 percent.

The rezoning of certain industrial land to agricultural, including Pace's tract is also inconsistent with the comprehensive plan. The comprehensive plan indicates that the Township planned to have a spirit of positive industrial

development in designated areas. The Southern Industrial Park was situated in one of these areas. As a result of these zoning changes, which included rezoning of 37 acres of Pace's land, industrial land was reduced from 2.1 percent to 1.4 percent.

Finally, the rezoning of the 37-acre tract caused tremendous economic detriment to Pace. Pace cannot subdivide these 37 acres for residential purposes, since a Township ordinance prohibits subdivision of lots in agricultural districts if they are less than 50 acres in size. (We have recently upheld a similar ordinance in *Codorus Township v. Rodgers*, ___ Pa. Commonwealth Ct. ___, ___ A.2d ___ (No. 2085 C.D. 1984, filed April 30, 1985).

Therefore, we conclude that the rezoning of Pace's 37 acres constituted arbitrary and unjustifiably discriminatory zoning.

II.

The United States District Court for the Middle District of Pennsylvania dismissed Pace's August 26, 1985, amended complaint. Judge Herman ruled that assuming a taking had occurred as a result of the defendants' conduct, no additional relief could be granted by the federal court. The court found a federal inverse condemnation remedy inappropriate and, because a state court had already declared the rezoning of Pace's 37 acres invalid, found injunctive relief unnecessary. With respect to Pace's due process claims, the court held that the state court's conclusion regarding the rezoning of the 37 acres constituted a binding determination that a denial of substantive due process had occurred. Nevertheless, it again found that no additional federal relief was appropriate. The court ruled that damages were not available under Section

1983 to compensate any temporary loss of use occasioned by the rezoning of Pace's land even if a substantive due process violation had occurred. Finally, because a rational basis could be found for all other actions of the Township, these other actions did not, according to the district court, violate substantive due process.

We have plenary power to examine the sufficiency of the complaint. Pace's complaint contests numerous actions by the Township: (1) the rezoning of the 37 acres, (2) enactment and use of vague water supply standards, (3) enactment of other environmental impact standards, (4) enactment of the special exception procedure, and (5) the adoption of other "unfair" but unidentified ordinances. Only two primary questions, however, are before the court.

The first question is whether the complaint adequately pleads a taking effected by the Township's rezoning and if so, whether compensation is available under the Fifth and Fourteenth Amendments. The state courts have already invalidated the rezoning, making federal injunctive relief unnecessary and inappropriate. A taking claim based on other aspects of the new ordinance (the new standards) is not yet ripe for decision, because the complaint does not allege that the Township, by invoking these standards, has made a final determination regarding use of Pace's land. The mere enactment of these provisions does not restrict Pace's land to certain uses. *See Agins v. Tiburon*, 447 U.S. 255 (1980) (zoning ordinance did not on face effect a taking; particular application of the ordinance not properly before court because appellants had not applied to make improvements on property); *see also MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986). Similarly, the Township's use of Section 402 and other sections of the old ordinance to reject Pace's 1978 development plan does not

constitute a possible basis for a taking claim. The Township's denial of approval in early 1979 simply rejected one proposed means of industrial development. This decision did not determine that certain uses were conclusively barred. Pace does not allege that the value of its property fell at the time of the Township's rejection of its 1978 plan. *See MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. at 2567-69 (one development proposal submitted and rejected, but because still no final determination of how ordinances restricted land use, taking claim not ripe for decision).

The second question before this court is whether the complaint adequately alleges that one or several of the Township's enactments violate substantive due process and if so, whether any federal relief is available for the violation. We must consider each of the four specific allegations of irrational legislation--the rezoning, the water supply standards, the other standards, and the special exception procedure. Statements in the complaint about "other unfair ordinances," however, are so vague that they clearly cannot form the basis for a valid claim. Neither the defendants nor the court can determine the zoning ordinance sections to which these statements refer. *See, e.g., Boudeloche v. Grow Chemical Coatings Corp.*, 728 F.2d 759, 762 (5th Cir. 1984) (claimant must give defendant fair notice); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (under Fed. R. Civ. P. 8(a)(2), pleading must give fair notice).

Based on the allegations of Pace's amended complaint, we conclude that the Township rezoning did not effect a taking of Pace's property. Accordingly, we have no occasion to consider the district court's conclusion that, assuming a taking occurred, damages for temporary loss of use are nevertheless unavailable.

We also conclude that Pace's amended complaint does not allege a violation of the due process clause. For this reason, we do not reach the issue of whether damages for temporary loss of use would be recoverable if a violation of due process had occurred.

III.

Pace's allegations with respect to the rezoning of some of its acreage from industrial to agricultural use cannot support a taking claim under the principles of taking analysis established by prior decisions of this Court. As Pace acknowledges, the Township, pursuant to the police powers delegated to it by the State, may regulate the uses of property within its jurisdiction to promote the public good. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978). The initial step in any taking analysis, accordingly, is whether the challenged governmental action advances a legitimate public interest. In this step, the governmental action is entitled to a presumption that it does advance the public interest. *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it). As we have earlier noted, Pace objects to the rezoning ordinance because it will allegedly "prevent change, keep other citizens out of the Township, . . . minimize Township services and expenditures, . . . keep taxes down," and reduce the level of potential industrial development from that

established by the preceding ordinance. This does not indicate that the rezoning ordinance was undertaken for a purpose other than benefiting the public interest. Indeed, these allegations confirm the contrary. Controlling the rate and character of community growth is the very objective of land use planning and Pace's property as well as the remaining properies in the Township have undoubtedly benefited from the Board's willingness to assure controlled development.[2]

Finding a public purpose does not end taking analysis, however. A legitimate exercise of police power and in particular, a general land use regulation, may nevertheless offend the Fifth and Fourteenth Amendments if its impact "denies [a landowner] the 'justice and fairness' guaranteed by" those Amendments. *Agins v. Tiburon*, 447 U.S. 255, 262 (1980) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124). Only when there is this kind of impact does a taking occur within the meaning of the just compensation clause.

In *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707 (3d Cir. 1985), *cert. granted*, 106 S.Ct. 1456 (Mar. 24, 1986) (No. 85-1092), this court found that although no precise formula for identifying a taking exists, there are several factors that have proven

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2 It is apparent from Pace's own allegations that its property has greatly appreciated in value over the last 20 years. Some of this appreciation has undoubtedly come from the fact that the Township is a more desirable place to live than it would have been without any development control. In addition, some of this appreciation has undoubtedly come from the fact that the Township land available for industrial development has been limited by Township zoning. Indeed, Pace's amended complaint alleges that at "all times relevant [Pace] had the only subdivided industrial park in the Township capable of immediate and future development." App. at 9.

relevant: the type of governmental interference; the diminution in property value; and the extent of interference with "reasonable, distinct, investment-backed expectations." 771 F.2d at 713. Governmental action will more readily be held a taking when it accomplishes physical invasion of the property. *Id.* at 712. Such an invasion is not present here. Thus, the first factor militates against finding a taking.

The issue, therefore, becomes whether the complaint alleges such extensive interference with the property's use that a taking without invasion has been pled. The latter two factors discussed in *Keystone*, each developed under varying factual circumstances, are different ways of looking at interference with use. *Id.* at 713. We first address the diminution in market value factor. As we stated in *Rogin v. Bensalem Township*, 616 F.2d 680, 692 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981), the courts will invoke the taking clause of the Fifth Amendment only when zoning regulation interferes drastically with a property's possible uses. "[U]nless application of the law destroys or severely diminishes the value of the property, the [Supreme] Court will uphold the application," even if the law prohibits a beneficial use to which certain parcels had been devoted and thus causes "substantial individualized harm." *Id.* at 690 (citation omitted).

Here Pace alleges generally that it "has been denied the economically viable use of its property." App. at 11. It then goes on to allege that the rezoned 37 acres had a value of $495,600 before the zoning change and a value of $52,000 once zoned agricultural. As we have earlier noted, putting these two allegations together makes it apparent that although Pace may have been denied the *best* use or uses of its 37 acres, it has not been deprived

of *all* economically viable uses of this property.[3] Although there has been a substantial diminution in value, this property retains a substantial value that establishes the existence of residual economically feasible uses.[4] The Supreme Court has made it clear that general land use regulation may deprive an owner of the best use or uses of his property without compensation. *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962). For this reason "the taking issue . . . is resolved by focusing on the uses the regulations permit" and on the residual value of the property. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131 (1978). In applying these principles, the Supreme Court has sustained land use regulations that have resulted in large reductions in value, similar to the one allegedly experienced by Pace, where the land retains significant value. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (reduction in value from $800,000 to $60,000); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value).

Pace also alleges that the rezoning "had the effect of prohibiting the completion of the [entire industrial park] development due to extremely high development completion costs." App. at 12. This statement refers to the development as planned by Pace before the zoning changes. Pace does not allege that alternative forms of industrial development or other profitable uses were

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3 Indeed, Pace's Second Count alleges that the zoning ordinance amendments were designed to prevent Pace from "exercising *an* economically viable use," not *all* economically visable uses, of its property. App. at 15 (emphasis supplied).

4 The Township's brief asserts, without contradiction, that this land has been farmed since purchased by Pace. It also notes that "agricultural" zoning allows some specified industrial uses. The rezoned value of $1,400 per acre compares favorably with Pace's original $515.07 per acre investment.

foreclosed by the rezoning of the 37 acres. More importantly, Pace does not allege that the value of its entire tract dropped significantly as a result of the rezoning.[5] The only allegation of a drop in value refers to the 37 rezoned acres and, as we have seen, that allegation does not demonstrate that a taking has occurred.[6]

Turning to the third factor in taking analysis, interference with "reasonable, distinct, investment-backed expectations," it is important to identify the context in which this factor evolved. It can be traced back to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where the Supreme Court held that Pennsylvania's Kohler Act effected a taking by halting plaintiff's coal-mining. In that case the coal company had sold the surface rights to particular properties, but had reserved the right to remove the coal thereunder and had secured a waiver of all claims from subsidence damage caused by the mining. The Pennsylvania statute, enacted after the sale, prohibited mining that caused the subsidence of any house unless the owner of the coal also owned the house. This legislation made the company's mining operations unprofitable and thus essentially took away its entire investment in the reserved rights, a previously

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5 Pace does allege that it cannot presently "readily market" the industrial lots because the "economy has changed in the vicinity" and because of competition from industrial developments in other municipalities, but this allegation is irrelevant to an analysis of whether the rezoning of the 37 acres constituted a taking.

6 Because Pace does not allege a diminution in the value of its entire industrial park, we need not address the difficult issue of whether the taking analysis in a case of this kind should focus on the value of the rezoned land only or on the value of all land in the park. *Compare American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) with *Jentzen v. United States*, 657 U.S. 1210 (Ct. Cl. 1981) and *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

profitable investment given that the company had contracted out of liability for any damage to surface structures.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Supreme Court explained the concept of reasonable, distinct, investment-backed expectations that emerged from Justice Holmes' decision in *Mahon*. It noted that the *Mahon* case did not mean one could "establish a 'taking' simply by showing that [he had] been denied the ability to exploit a property interest that [he] heretofore had believed was available for development." 438 U.S. at 130. Nor, as we have seen, does it mean that once a property has been devoted to a particular use, the owner has a reasonable expectation of being able to continue with that use absent the payment of compensation. *Goldblatt, supra; Hadacheck, supra.*

In *Keystone*, we were confronted with a challenge to another Pennsylvania statute that dealt with the coal mining industry and the problem of subsidence. The *Mahon* case was distinguished and the statute upheld:

> In *Penn Central*, the Court . . . read *Mahon* as stating that a statute may "frustrate distinct investment-backed expectations" when it has "nearly the same effect as the complete destruction of rights [a party] had reserved from the owners of the surface land." *Penn Central*, 438 U.S. at 127, 98 S.Ct. at 2661. The Court thus stressed that the coal owners in *Mahon* had expressly contracted with individual surface owners for the waiver of any claim for damages due to subsidence. It was reasonable for them to have distinct expectations, grounded upon those waivers, to be free to mine coal without liability for damage caused to the surface owners' estates. The Kohler Act thwarted those expectations by shifting the burden

> contractually imposed upon the surface owners to the mine operators. In so doing the Act appeared only to affect private interests.
>
> In the present appeal, however, the statute at issue is clearly designed to serve broad and legitimate *public* interests. The ownership of the support estate does not afford a mine operator a reasonable expectation to profit at the expense of the public at large, but only at the expense of the surface owner with whom it contracted. . . . Just as coal mining activities may be restricted when they intrude upon the interests of adjacent owners, or the holders of water rights, police power may be invoked to protect the public. Thus, a property owner's reasonable expectations as to the possible uses of his property are always circumscribed by the limitations on its use that may be imposed by the state in the public interest. . . .

771 F.2d at 716-17.

The concept of reasonable, distinct, investment-backed expectations may, as Pace suggests, involve a recognition of the fact that a property can have value, arising from partially executed plans for development, that is unique to its owner and not reflected in its current market value. We accept this premise for present purposes. We note two limiting principles based on the foregoing case law, however. First, distinct, investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest. Second, even where distinct, investment-backed expectations are involved, a taking through an exercise of the police power occurs only when the regulation "has nearly the same effect as the

complete destruction of [the property] rights" of the owner. *Keystone, supra*, 771 F.2d at 716.

In this case, Pace seems to allege that it had distinct investment-backed expectations in its 37 acres because, between the preliminary approval in 1973 and July of 1979, it invested $142,000 for road construction, utility improvements, and engineering costs. While Pace does not allege how much of this development expense is attributable to the lots which received final approval in accordance with its original expectation or how much could have been recouped in the development of the 108.61 acres which remained zoned for industrial development, we may assume for present purposes that some of these funds were invested in order to develop the 37 acres for industrial uses. This assumption, however, does not aid Pace in its argument that the rezoning constituted a taking. Because Pace's expectations, in order to be reasonable, were necessarily subject to the power of the state to reasonably regulate in the public interest, Pace could have had no reasonable expectation in the Spring of 1979 that it would be entitled to utilize its 37 acres in accordance with its original plan.

Throughout the time Pace was developing its plans, Pennsylvania law recognized Pace's legitimate interest in being able to execute its project and recoup its development cost free of any changes in the land use planning rules that would frustrate Pace's original expectations. At the same time, Pennsylvania law also recognized the legitimate interest of municipalities in being able to modify land use planning rules when they perceived the need for change. In exercising its police power, Pennsylvania struck the balance between the expectations of landowners like Pace and the expectations of municipalities like the Township by providing landowners a three-year period to realize

their expectations sheltered from land use planning changes and by authorizing the municipalities to make changes applicable to projects in development after their third anniversary. Thus, under the Pennsylvania Municipal Planning Code, 53 P.S. §§ 10101, *et seq.*, during the period from 1968 to 1982, a landowner who had received a preliminary approval was entitled to have his final plan processed under the law as it existed at the time of preliminary approval so long as less than three years had passed. After three years, however, the landowner's project became subject to any restrictions imposed by new land use regulations. *See* 53 P.S. § 10508(4); App. at 110 (state court interpretation of three-year rule in this case).[7]

Given this regulatory framework, Pace could have had a reasonable expectation of recouping its $142,000 investment in accordance with its original plan only through its 1978 submission. That submission, however, was considered by the Board of Supervisors under the original ordinance and was unaffected by the 1979 rezoning. Once the Township modified its zoning ordinance in 1979, Pace became subject to the amendments with respect to any plans Pace submitted after the date of enactment because Pace's preliminary plans gained approval over three years prior to March, 1979. Pennsylvania law had allowed Pace a three-year period for fulfillment of its original expectations. The rezoning thus came at a time when Pace could no longer have had reasonable expectations that rezoning would not interfere with its $142,000 investment.

As we have earlier noted, local governments have a legitimate interest in controlling growth on a continuing basis. *Rogin*, 616 F.2d at 689. The

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7 In 1982, the legislature extended the sheltered time period to five years. 53 P.S. § 10508(4).

possibility that Pace would have to alter its plans to conform to changes in the zoning ordinance in the event it did not complete its project within the reasonable period provided by Pennsylvania law should have been part of Pace's reasonable expectations.

Because Pace's complaint alleges neither physical invasion of its property nor interference with reasonable, distinct, investment-backed expectations and because the diminution in value pled is insufficient to support a finding that the rezoning effected a taking, Pace fails to state a taking claim upon which relief can be granted.

IV.

We also find that the complaint does not allege a substantive due process violation. We conclude at the outset that the district court erred in holding that it was bound to find a denial of substantive due process once the Commonwealth Court termed the Township's rezoning "arbitrary and unjustifiably discriminatory." The issue before that court and the substantive due process issue presented to the district court by Pace's complaint are simply not the same issue. This is apparent from the opinion of the Commonwealth Court from which we have earlier quoted at some length to illustrate this point. The governing rule of law taken by that court from the *Commercial Properties* case bears no resemblence to any aspect of federal substantive due process law and the reasoning of that court reflects a far more active scrutiny of the Township's actions than would be appropriate in federal substantive due process analysis.

The Fifth Circuit Court of Appeals has described accurately the narrow review that is proper for a courts' scrutiny of zoning ordinances and their compliance with federal substantive due process standards:

> Given the legislative or quasi-legislative nature of zoning decisions, their review by federal courts is quite different from the review to which they may be subjected by state courts. *See, e.g., Fleming v. City of Tacoma*, 81 Wash.2d 292, 502 P.2d 327 (1972) (rezoning amendments are subject to review under Washington "appearance of fairness" doctrine). It is also very different from the review of certain federal administrative actions, where, by statute, a decision must be overturned if not supported by "substantial evidence" on the record. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983). Unlike such schemes for administrative review, federal judicial interference with a state zoning board's quasi-legislative decisions, like invalidation of legislation for "irrationality" or "arbitrariness," is proper *only if the governmental body could have had no legitimate reason for its decision. See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981); *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979).

*Shelton v. City of College Station*, 780 F.2d 475, 482-83 (5th Cir. 1986) (en banc) (emphasis supplied), *cert. denied*, 106 S.Ct. 3276 (1986) and 107 S.Ct. 89 (1986). *See also Kaplan v. Clear Lake City Water Auth.*, 794 F.2d 1059 (5th Cir. 1986). As we stated in *Rogin*:

> The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is

> enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

616 F.2d at 689 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955) ).

The federal courts largely defer to legislative judgment on such matters as zoning regulation "because of the recognition that the process of democratic political decisionmaking often entails the accomodation of competing interests, and thus necessarily produces laws that burden some groups and not others." *Id.* at 687. This court will not substitute its judgment about land use policy and thereby undermine the legitimacy of democratic decisionmaking unless the local legislative judgment is without a plausible rational basis.

Our very limited federal review differs markedly from the test employed in this case by the Commonwealth Court, which found that the Township had not carried a burden of producing evidence that demonstrated a substantial relationship between its action and the public interest. We must look instead to whether, given the facts alleged in the amended complaint, the Township could have had a legitimate reason for its decision. When we examine that pleading, including its allegations concerning the Township's reasons for its actions, we find nothing to suggest that the Township's removal of Pace's 37 acres from the industrial classification was anything other than a land use planning decision about which reasonable minds might differ.

A plaintiff making a substantive due process claim in federal court has the burden of showing that the regulation is arbitrary or irrational. *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Thus to

state a claim. Pace's complaint would have to allege facts that would support a finding of arbitrary or irrational legislative action by the Township. *See Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985). As earlier noted, it is well settled in this Circuit that conclusory pleadings do not suffice to state a claim under 42 U.S.C. § 1983 such as the present one. *See, e.g., Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976); *Boykins v. Ambridge Area School Dist.*, 621 F.2d 75 (3d Cir. 1980). Pace's complaint fails to make any factual allegations that indicate irrationality. The complaint's only relevant factual assertion is that the zoning changes "did not conform to the spirit and general guidelines of the comprehensive plan which encouraged industrial development," App. at 12. This shows only a change of legislative position, not irrationality.[8] As we have noted, Pace does not present a case involving actions aimed at this developer for reasons unrelated to land use planning. Rather, the case involves a difference of opinion on how much industrial development is in the best interest of the Township and how that quantum of industrial development should be achieved.

Pace's own allegations provide a legitimate justification for all the contested actions--the rezoning, the water supply standards, the other environmental impact standards, and the special exception procedure. The complaint states that the Township acted to curb industrial development within the

---

8 If Pace had pled the fact, relied on in its brief, that the zoning changes diminished the total acreage zoned agricultural, this too would not indicate that the Township acted without any plausible and legitimate rational basis. As Pace itself alleges, one of the purposes of the changes was to curb industrial development. The fact that the effect of the changes was a net decrease of a few acres in the total acreage zoned agricultural is not inconsistent with the objective.

Township. One can easily articulate a rational connection between each of the Township's actions and this legitimate purpose. Indeed the Township provided such an articulation in its detailed letter to the York County Planning Commission dated January 29, 1979, over a month before the zoning amendments were adopted. That letter described the primary purposes of the amendments, including the reduction of the amount of land zoned industrial, as follows:

> In analyzing what changes, if any, should be made in the Township Zoning Ordinance, the Planning Commission first considered the goals and needs of the Township and the existing ordinance to see how those goals and needs were fulfilled by that ordinance.
>
> Upon making this analysis, the first thing which became obvious was that although the Township desired to conserve its highly productive soils in agricultural use feeling that its quality agricultural land represented an important natural resource, it had zoned a great deal of its best agricultural land for development use. In fact, almost all of the land zoned by the present ordinance for development purposes was in the Shrewsbury-New Freedom area where the Township's best soils are located rather than in the Glen Rock area where the land quality is poorer. The Planning Commission also noted that it had zoned a great deal of land for industrial development in relationship to the amount of industry it could absorb and still retain its status as an agricultural community. . . .
>
> * * *
>
> Because the industrial zone seems excessive in size in relationship to anticipated township industrial requirements, it was reduced in size.

> Also, there was a real concern for the impact full development of the lands zoned industrial under the current ordinance would have on the village of Tolna and surrounding areas both from a traffic standpoint and from a flooding standpoint.

App. at 69-70. Reduction of the amount of land zoned industrial and standards and procedures that allow the Township to closely monitor any industrial development that does occur are measures rationally related to the goal of restricting industrial presence in the Township for the benefit of the general welfare.

We find this case remarkably similar to the situation which confronted the Count of Appeals for the First Circuit in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982). The plaintiffs there complained that the town had violated due process when it misapplied state law in order to protect "the town's basic character" and, as a result, frustrated the plaintiffs' development plans. The court's response is equally appropriate here:

> Here it is merely indicated that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws. . . .
>
> * * *
>
> Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of [plaintiff's] characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by [plaintiff], as well as other cases, all suggest that the conventional planning dispute -- at least when not tainted with fundamental procedural irregularity, racial animus, or the like--

> which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate. A federal court, after all, "should not . . . sit as a zoning board of appeals." Village of Belle Terre v. Boraas, 416 U.S. 1, 12, 94 S.Ct. 1536, 1542, 39 L.Ed.2d 145 (1974) (Marshall, J., dissenting). . . .

680 F.2d at 832-33.

Because it appears on the face of the amended complaint that the Township decisionmakers could have had rational reasons for the decisions contested here and because that complaint alleges no facts suggesting arbitrariness, it fails to state a substantive due process claim upon which relief can be granted. *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981).

V.

Pace's complaint reflects a dispute over legislative judgment on issues of land use planning. Under the due process clause, we defer to legislative judgment unless it can have no rational, legitimate foundation. Pace affirmatively alleges a legitimate basis for the actions of the Township and suggests nothing tending to show that they were arbitrary or capricious. Moreover, Pace's complaint does not allege sufficient interference with its property rights for us to conclude that the Township's actions effected a taking. Accordingly, we will affirm the district court's dismissal of Pace's complaint.

*Appendix B—Appeals Court Opinion.*

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX C

**Commonwealth Court Opinion**

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

RECEIVED
10:30
May 21 1985
Laucks & Monroe

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No. 864 C.D. 1984

---

PACE RESOURCES, INC.,

*Appellant,*

vs.

SHREWSBURY TOWNSHIP PLANNING COMMISSION
and SHREWSBURY TOWNSHIP BOARD
OF SUPERVISORS,

*Appellees.*

---

No. 991 C.D. 1984

---

SHREWSBURY TOWNSHIP PLANNING COMMISSION
and SHREWSBURY TOWNSHIP BOARD
OF SUPERVISORS,

*Appellants,*

vs.

PACE RESOURCES, INC.,

*Appellee.*

---

No. 863 C.D. 1984

---

*Appendix C—Commonwealth Court Opinion.*

PACE RESOURCES, INC.,

*Appellant,*

vs.

ZONING HEARING BOARD OF SHREWSBURY TOWNSHIP,

*Appellee.*

---

No. 990 C.D. 1984

---

SHREWSBURY TOWNSHIP PLANNING COMMISSION and SHREWSBURY TOWNSHIP BOARD OF SUPERVISORS,

*Appellants,*

vs.

PACE RESOURCES, INC.,

*Appellee.*

---

BEFORE:
Honorable David W. Craig, *Judge*
Honorable James Gardner Colins, *Judge*
Honorable Genevieve Blatt, *Senior Judge*

ARGUED: January 31, 1985

Opinion by Judge Colins Filed: May 23, 1985

In this appeal, we must determine whether Section 402 (approval of on-lot water systems) of the Shrewsbury Township (Township) Subdivision and Land Ordinance is void for vagueness and whether an amendment to that

ordinance which rezoned a 39-acre tract from "industrial" to "agricultural" constituted discriminatory zoning.

In 1965, Pace Resources, Inc. (Pace)[1] purchased a 145.61 acre tract of land in the Township. Pace developed preliminary plans to subdivide this land and create an industrial park, to be known as Southern Industrial Park. At the time of the purchase and initial development of the subdivision plans, Shrewsbury Township had neither a zoning ordinance nor a comprehensive plan.

Pace divided its land into 47 lots and submitted a preliminary subdivision plan to the Township. The Board of Supervisors approved this plan on April 2, 1973. Pace submitted and later received final plan approval for several of these lots.

In November of 1976, the Township adopted its first Comprehensive Plan and its first Zoning Ordinance. Pursuant to this ordinance, Pace's entire tract was zoned "industrial".

Pace resubmitted a preliminary subdivision plan for lots 28 through 40 and 44 through 47, in December of 1978. In addition, Pace submitted a "preliminary/final"[2] plan for lots 3 through 5, 7 through 16, and 41 through 43.

On January 9, 1979, the Board of Supervisors met with the Township solicitor and zoning officer to conduct a review of the Township's Zoning Ordinance and Comprehensive Plan. As a result of this meeting, several proposed zoning amendments were prepared by the

solicitor and submitted to the York County Planning Commission, including a proposal to rezone 37 acres of Pace's land to "agricultural".

The Board of Supervisors met on February 7, 1979, and, after reviewing Pace's subdivision plan for the above-mentioned lots, presented Pace with a list entitled "Defects in Final Plan Subdivision by Southern Industrial Park." Pace requested and received a continuance to allow it to correct the enumerated defects. On March 7, 1979, at a joint meeting of the Planning Commission and the Board of Supervisors, Pace resubmitted its subdivision plan, which again was rejected. Formal written notice of the rejection and the reasons therefore were mailed to Pace on March 8, 1979. The crux of the Board of Supervisors' decision to deny Pace approval centered on Pace's failure to comply with Section 402 of the Township Subdivision and Land Development Ordinance.

Pace appealed this decision to the Zoning Hearing Board (Board), which on December 22, 1980, dismissed Pace's appeal. Pace then filed several appeals to the Court of Common Pleas of York County.[3] On August 31, 1983, the Court of Common Pleas remanded the matter to the Township Board of Supervisors for reconsideration of its decision to grant or deny approval of Pace's preliminary and final plans because the Court found that the Board of Supervisors had committed an error of law by relying on Section 402 to deny Pace's subdivision plans. On September 27, 1983, Pace filed an application for reconsideration of the order of August 31, 1983, with the Court of Common Pleas. On reconsideration, the Court addressed the constitutionality challenges previously raised by Pace. The Court, on March 12, 1984,

dismissed each, including the allegation that spot zoning had occurred. Consolidated for disposition before this court are the appeals of Pace and the Township from orders of the Court of Common Pleas of York County dated August 31, 1983, and March 12, 1984.[4]

Our scope of review where, as here, the lower court has taken no additional evidence is limited to a determination of whether or not the Board of Supervisors has committed an abuse of discretion or an error of law. *Ridgeview Associates v. The Board of Supervisors of Lower Paxton Township,* 17 Pa. Commonwealth Ct. 459, 333 A.2d 249 (1975).

We will first address the issue whether Section 402 of the Township Subdivision and Land Development Ordinance is void for vagueness.

Section 402 provides in pertinent part that:

> The Board of Supervisors will approve individual on-lot water supply systems only when the feasibility study indicates that the Township and the Township engineer certifies that justification of the project necessitates consideration of this method, the water supply yield is adequate for the type of development proposed, the installation of such systems will not endanger or decrease ground water of properties adjacent to the land development.

When the governing body or the planning agency entrusted with the power of reviewing applications for subdivision or preliminary development approval rejects an application, Section 508(2) of the Municipalities Planning Code[5] requires its decision to "specify the defects found in the application and describe the

requirements which have not been met and shall, in each case, cite the provisions of the statute or ordinance relied upon."

Section 402 provides no requirement or criterion by which the courts could review a finding of noncompliance with it. The idea of providing an "adequate" water supply and the installation of such systems so as not to "endanger or decrease" ground water supplies of adjacent land are insufficient standards by which to deny a proposed subdivision. "[T]here is no statutory authority to permit such nebulous reasons to defeat a subdivision plan." *Brauns v. Swarthmore Borough*, 4 Pa. Commonwealth Ct. 627, 635, 288 A.2d 830, 834 (1972); *See also Harrisburg Fore Associates v. Board of Supervisors of Lower Paxton*, 21 Pa. Commonwealth Ct. 137, 344 A.2d 277 (1975); *Goodman v. Board of Commissioners of the Township of South Whitehall*, 49 Pa. Commonwealth Ct. 35, 411 A.2d 838 (1980). Therefore, the Board of Supervisors committed an error of law when it relied on Section 402 of the Township's ordinance to deny approval of Pace's subdivision plans.

We now turn to the issue of whether the rezoning of 37 acres of Pace's land from "industrial" to "agricultural" constituted illegal discriminatory zoning.

One form of discriminatory zoning is spot zoning. In *Mulac Appeal*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965), our Supreme Court defined spot zoning as "[a] singling out of one lot or small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his

economic detriment." The Court in *Mulac* went on to state that: "[T]he size of the property involved is only one of the determining factors. What is most determininative is whether the parcel in question is being singled out for treatment unjustifiably differing from that of similar surrounding land, thereby creating an 'island' having no relevant differences from its neighbors." *Id. See also Schubach v. Silver,* 461 Pa. 366, 382, 336 A.2d 328, 336 (1975). Furthermore, our Supreme Court has cautioned us that we should not limit our inquiry to the mere physical aspect and characteristics of the land, but we should also consider how the rezoning affects the public health, safety, morals, and general welfare and how it relates to the township's comprehensive plan. *Schubach,* 461 Pa. at 382-83 n. 14, 336 A.2d at 336 n. 14.

In the instant case, the size of the rezoned area, 37 acres, is considerably larger than other areas found by our courts to be the object of spot zoning. *See Glorioso Appeal,* 413 Pa. 194, 196 A.2d 668 (1964); *French v. Zoning Board of Adjustment,* 408 Pa. 479, 184 A.2d 791 (1962). However, even relatively large tracts of land can in fact be a spot zone. In *Commercial Properties, Inc. v. Peternel,* 418 Pa. 304, 311, 211 A.2d 514, 519 (1965), our Supreme Court stated that: "It makes no difference whether it is a one-quarter acre lot or a 50 acre industrial complex which is the subject of the rezoning. If it is aimed at preventing a theretofore legal use of an integrated unit owned by one common interest, the action cannot be supported as valid rezoning." Similarly, in *Appeal of Benech,* 28 Pa. Commonwealth Ct. 415, 368 A.2d 828 (1977), we held that a rezoned parcel of 80 acres was a spot zone.

The Township, in this case, has failed to show any substantial relationship between the rezoning of 37 acres of Pace's land and the public health, safety, morals, or welfare. The rezoning of Pace's land to "agricultural" was accomplished by the Board of Supervisors in only an hour from the introduction of the Ordinance to its final passage. This differs sharply from the prior zoning scheme which was the product of months of planning, studies, and meetings. In fact, the record indicates that this change was prompted by a petition from area residents requesting such a change, and that the circulator of the petition was the wife of one of the Planning Commissioners.

The stated intent of the Planning Commission and the Board of Supervisors was to preserve the rural nature and agricultural integrity of the Township. However, as a result of this rezoning and other zoning changes made,[6] the agricultural land was actually reduced from 69.4 percent to 68.6 percent.

The rezoning of certain industrial land to agricultural, including Pace's tract is also inconsistent with the comprehensive plan. The comprehensive plan indicates that the Township planned to have a spirit of positive industrial development in designated areas. The Southern Industrial Park was situated in one of these areas. As a result of these zoning changes, which included rezoning of 37 acres of Pace's land, industrial land was reduced from 2.1 percent to 1.4 percent.

Finally, the rezoning of the 37-acre tract caused tremendous economic detriment to Pace. Pace cannot subdivide these 37 acres for residential purposes, since a Township ordinance prohibits subdivision of lots in

agricultural districts if they are less than 50 acres in size. (We have recently upheld a similar ordinance in *Codorus Township v. Rodgers,* _____ Pa. Commonwealth Ct. _____, _____ A.2d _____ (No. 2085 C.D. 1984, filed April 30, 1985).

Therefore, we conclude that the rezoning of Pace's 37 acres constituted arbitrary and unjustifiably discriminatory zoning.

Accordingly, for the aforementioned reasons, the orders of the Court of Common Pleas of York County, dated August 31, 1983, and March 12, 1984, are affirmed in part and reversed in part. They are affirmed insofar as they relate to the holding in Civil Action No. 79-S-1034, that Section 402 of the Township Subdivision and Land Development Ordinance is void for vagueness and reversed insofar as they pertain to the holding in Civil Action No. 81-S-277, that no discriminatory zoning had occurred.

The matter is remanded to the Court of Common Pleas for further proceedings consistent with the opinion of the trial court in Civil Action No. 79-S-1034.

JAMES GARDNER COLINS
James Gardner Colins, *Judge*

Judge Williams, Jr. did not participate in the decision in this case.

FOOTNOTES

[1] Pace was formerly known as Buchart Associates when it first purchased this land.

[2] In the belief that Pace had not effected preliminary approval for these lots for which Pace sought final approval, the Board of Supervisors requested Pace to amend its final plans to be titled preliminary plans. Pace complied with this request and these plans are referred to as "preliminary/final plans".

[3] In Civil Action No. 79-S-1034, Pace appealed the denial of its subdivision plans by the Township Planning Commission and the Board of Supervisors. In Civil Action No. 81-S-277, Pace appealed from the opinion and order of the Board regarding the validity of the amendments to the Township Zoning Ordinance and Subdivision and Land Development Ordinance.

In addition, the Township in Civil Action No. 81-S-266 cross-appealed the decision of the Board which dismissed Pace's appeal, in order to preserve proposed findings of fact which were not adopted by the Board, but which it felt supported the Board's decision.

[4] On September 23, 1983, Pace filed Notice of Appeal to this court in Civil Action Nos. 79-S-1034, and 81-S-277. The Township on September 30, 1983, filed Notice of Appeal to this court in Civil Action Nos. 79-S-1034 and 81-S-266.

[5] Act of 1968, July 31, P.L. 805, *as amended*, 53 P.S. §10508(2).

[6] 128.1 acres of land previously zoned industrial was rezoned to "agricultural" and other designations. Thirty-seven acres of this land belongs to Pace.

*Appendix C—Commonwealth Court Opinion.*

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

---

No. 864 C.D. 1984

---

PACE RESOURCES, INC.,

*Appellant,*

vs.

SHREWSBURY TOWNSHIP PLANNING COMMISSION and SHREWSBURY TOWNSHIP BOARD OF SUPERVISORS,

*Appellees.*

---

No. 991 C.D. 1984

---

SHREWSBURY TOWNSHIP PLANNING COMMISSION and SHREWSBURY TOWNSHIP BOARD OF SUPERVISORS,

*Appellants,*

vs.

PACE RESOURCES, INC.,

*Appellee.*

---

No. 863 C.D. 1984

---

*Appendix C—Commonwealth Court Opinion.*

PACE RESOURCES, INC.,

*Appellant,*

vs.

ZONING HEARING BOARD OF SHREWSBURY TOWNSHIP,

*Appellee.*

---

No. 990 C.D. 1984

---

SHREWSBURY TOWNSHIP PLANNING COMMISSION and SHREWSBURY TOWNSHIP BOARD OF SUPERVISORS,

*Appellants,*

vs.

PACE RESOURCES, INC.,

*Appellee.*

---

*ORDER*

AND NOW, this 23rd day of May, 1985, the orders of the Court of Common Pleas of York County, dated August 31, 1983, and March 12, 1984, are affirmed in part and reversed in part. They are affirmed insofar as they relate to the holding in Civil Action No. 79-S-1034, that Section 402 of the Township Subdivision and Land Development Ordinance is void for vagueness and reversed insofar as they pertain to the holding in Civil Action No. 81-S-277, that no discriminatory zoning had occurred.

*Appendix C—Commonwealth Court Opinion.*

The matter is remanded to the Court of Common Pleas of York County for further proceedings consistent with the opinion of the trial court in Civil Action No. 79-S-1034.

Jurisdiction relinquished.

JAMES GARDNER COLINS
James Gardner Colins, *Judge*

Certified From The Record
May 23 1985
C. R. HOSTUTLER
Deputy Prothonotary - Chief Clerk

## APPENDIX D

**Judgment Issued by Third Circuit Court of Appeals**

UNITED STATES COURT OF APPEALS

For the Third Circuit

---

No. 86-5210

---

PACE RESOURCES, INC.,

*Appellant,*

vs.

SHREWSBURY TOWNSHIP, O'KEEFE, JOHN J., NACE, CLARENCE E., DUTTON, JOHN D., MALONE, GILBERT G., SOLOMON, WILLIAM J., NIELSEN, CARL, GRIM, RICHARD M., McKAY, RONALD and SPANGLER, LARRY C.

---

(D. C. Civ. No. 81-0327).

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On Appeal from the United States District Court for the Middle District of Pennsylvania.

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Present: ADAMS* and STAPLETON, *Circuit Judges* and COWEN, *District Judge***

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* Hon. Arlin M. Adams, United States Circuit Judge, was present at oral argument but did not participate in the decision.

** Hon. Robert E. Cowen, United States District Judge for the District of New Jersey, sitting by designation.

*Appendix D—Judgment Issued by Third Circuit Court of Appeals.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel September 17, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 17, 1986, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

SALLY MRVOS
Clerk

January 12, 1987

Certified as a true copy and issued on lieu of a formal mandate on February 3, 1987.

Test: M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

## APPENDIX E

### Amended Complaint

IN THE UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

---

Civil Action No. 81-0327
Jury Trial Demanded

---

PACE RESOURCES, INC.,

vs.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NEILSEN, RICHARD M. GRIM, RONALD McKAY, LARRY C. SPANGLER.

---

*AMENDED COMPLAINT*

1.

Jurisdiction is based upon the following federal statutes: Acts of May 31, 1970, c. 114 §16, 16 Stat. 144; 42 U.S.C. §1981; Act of April 20, 1871, c. 22 §1, 17 Stat. 13; 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution.

2.

Plaintiff is Pace Resources, Inc., a Pennsylvania corporation with offices located at 40 South Richland Avenue, York, Pennsylvania, who brings this action on its own behalf and on behalf of all of its officers and

shareholders having an interest in the corporation who are residents and citizens of the United States of America.

3.

The Defendant, Shrewsbury Township, is a second class township duly established under the laws of the Commonwealth of Pennsylvania with offices located at R. D. #1, Box 468A, Glen Rock, Pennsylvania 17327.

4.

At all times relevant hereto the above named individual Defendants were acting as elected or appointed officials of Shrewsbury Township and were acting in the scope and course of their officially granted powers of office.

5.

At all relevant times, the Defendants were acting under color of state law exercising authority that is derived from the laws of the Commonwealth of Pennsylvania, to wit: the Second Class Township Code Act of May 1, 1933, P.L. 103 Art. I §101, *et seq.* as amended; 53 P.S. §65101, *et seq.*; The Pennsylvania Planning Code, Act of July 31, 1968, P.L. 805, Art. I §101 *et seq.* and other laws of the Commonwealth of Pennsylvania.

6.

The Defendant, John J. O'Keefe, is an adult individual residing at R.D. #1, Glen Rock, Pennsylvania 17327, and at all times relevant hereto was a duly elected supervisor of Shrewsbury Township, York County, Pennsylvania, and was acting as Chairman of the Board of Supervisors.

7.

The Defendant, Clarence E. Nace, is an adult individual residing at R.D. #3, Glen Rock, Pennsylvania 17327, and at all times relevant hereto was a duly elected supervisor of Shrewsbury Township, York County, Pennsylvania.

8.

The Defendant, John D. Dutton, is an adult individual residing at R. D. #2, Stewartstown, Pennsylvania 17363, and at all times relevant hereto was a duly elected supervisor of Shrewsbury Township, York County, Pennsylvania.

9.

All supervisors named herein were elected to the Township office established by the Act of July 13, 1961, P.L. 596, §1, as amended; 53 P.S. §65410.

10.

The Defendant, Gilbert G. Malone, is an adult individual with business offices located at 145 East Market Street, York, Pennsylvania 17401, and at all times relevant hereto was the duly constituted solicitor

for Shrewsbury Township, York County, Pennsylvania, a position established by the Second Class Township Code of Pennsylvania, by the Act of October 19, 1967, P.L. 456; No. 213, §1 as amended; 53 P.S. §65580. In addition the Defendant also acted as solicitor for the Shrewsbury Township Planning Commission.

11.

The Defendant, William J. Solomon, is an adult individual residing at R. D. #1, New Freedom, Pennsylvania 17349, and at all times relevant hereto was the Chairman of the Shrewsbury Township Planning Commission.

12.

The Defendant, Carl Nielsen, is an adult individual residing at R. D. #2, New Freedom, Pennsylvania 17349, and at all times relevant hereto was a member of the Shrewsbury Township Planning Commission.

13.

The Defendant, Richard M. Grim, is an adult individual residing at R. D. #1, Glen Rock, Pennsylvania 17327, and at all times relevant hereto was a member of the Shrewsbury Township Planning Commission.

14.

The Defendant, Ronald McKay, is an adult individual residing at 22 Crosswinds Drive, Shrewsbury, Pennsylvania 17361, and at all times relevant hereto was a member of the Shrewsbury Township Planning Commission.

*Appendix E—Amended Complaint.*

15.

The Defendant, Larry C. Spangler, is an adult individual residing at R. D. #1, Forest Lakes, New Freedom, Pennsylvania 17349, and at all times relevant hereto was a member of the Shrewsbury Township Planning Commission.

16.

All planning commission members were duly appointed to the office by virtue of the authority set forth in the Act of July 31, 1968, P.L. 805, Art. II §202; 53 P.L. §10202 as amended.

17.

Plaintiff, Pace Resources, Inc., at all times relevant to these proceedings was the owner of a tract of land consisting of approximately 145 acres situate in Shrewsbury Township and being designated as the Southern Industrial Park.

18.

On April 2, 1973, a Preliminary Subdivision Plan for the Southern Industrial Park was approved by Shrewsbury Township.

19.

On July 9, 1973, a Final Subdivision Plan for lots 1, 2, 22, 23, 26 and 27, and the Southern Industrial Park was approved by Shrewsbury Township.

20.

By resolution on August 19, 1974, Shrewsbury Township provided no further development could occur in the industrial park until a public sewer system was constructed to service the park and that the Township would continue to endeavor to obtain sewer service to the park.

21.

Lots 1, 2, 22, 23, 26 and 27 were promptly sold by Plaintiff.

22.

Buildings were erected by buyers in the Southern Industrial Park on Lots 1, 2, 22 and 27.

23.

On September 26, 1974, Shrewsbury Township approved a re-submitted Preliminary Plan for lots 28 through 47 of the Industrial Park.

24.

In 1977, the Final Plan for submission of Lots 6, 17, 18, 19, 20 and 21 in the Southern Industrial Park were approved by default of the Shrewsbury Township officials under the laws existing in the Commonwealth of Pennsylvania.

25.

In November, 1976, after extensive hearings the Shrewsbury Township adopted a zoning ordinance and a comprehensive plan with the Southern Industrial Park being zoned for industrial use.

26.

Shrewsbury Township did not implement the construction of a community sewer system as provided by its resolution of August 19, 1974.

27.

Despite Shrewsbury Township's passivity and lack of cooperation, the Plaintiff constantly endeavored to obtain approval for the construction of a sewer system from August 1974, through November 1978, when it became apparent to all parties and certain residents in the vicinity that Plaintiff would be permitted to bring sewer service to the Southern Industrial Park and thereby to complete development of the same.

28.

At all times relevant hereto the Plaintiff had the only subdivided industrial park in the Township capable of immediate and future development.

29.

When it became apparent that the Southern Industrial Park was capable of completion certain residents began to file objections with the Defendants to prevent the completion of the Southern Industrial Park.

30.

As a result of the protestants' efforts and the policy and custom followed by the Defendants, the Defendants agreed in November, 1978, to reevaluate the zoning of Plaintiff's industrial park and to consider re-zoning the Plaintiff's park from industrial to agricultural or conservation use.

31.

On, before and after January 9, 1979, and up to the present, the Defendants adopted the custom and policy of preventing the lawful and reasonable use of Plaintiff's land in Shrewsbury Township. This was done as part of a personal desire to prevent change, keep other citizens out of the Township, to minimize Township services and expenditures and keep taxes down.

32.

Under the guise of protecting land being utilized for agricultural purposes, the Defendants imposed administrative burdens, drafted and enacted and enforced discriminatory, unreasonable and arbitrary regulations that inhibited the industrial development in the Township. The Defendants effectively prohibited Plaintiff, an owner of land set aside and being used for industrial development, from completing the lawful and intended use of its land.

33.

On, before and after January 9, 1979, the Defendants met in concert and conspired to use their power as appointed and elected officials and the existing legislative judicial systems to prevent the lawful development of Plaintiff's industrial park.

34.

The Defendants, at a meeting on or about January 9, 1979, unlawfully agreed to use their authority as appointed and elected officials who were acting under the color of their office to delay and deny approval of Plaintiff's submitted subdivision plans until they could re-zone 37 acres of the Southern Industrial Park from its industrial use to an agricultural use. In addition, the Defendants conspired and agreed to use their official authority to enforce existing oppressive and unconstitutional Township regulations and to enact new regulations that would prevent or delay Plaintiff's lawful development of its property and that would protect and implement the official and unlawful policies of the Defendants.

35.

The Defendants specifically conspired to use their official governmental positions and offices to cripple and destroy Plaintiff's industrial development. The Defendants, acting under the color of their offices, tried to prevent the successful completion of the Plaintiff's industrial park in as many ways as possible.

36.

Pursuant to the unlawful conspiracy to defeat Plaintiff's development, the Defendants adopted and/or enforced ordinances that were so restrictive and different from similar ordinances in other municipalities of the County, that the Plaintiff could not effectively or reasonably compete with other industrial developments in that vacinity.

37.

The actions of the Defendants deprived the Plaintiff of its rights to market and sell property, and constituted the invidious appropriation of Plaintiff's property without making or being required to make just compensation therefore. Plaintiff has been denied the economically viable use of its property in violation of the just compensation clause of the Fifth Amendment.

38.

The actions of the Defendants constituted an unlawful exercise of their police powers and deprived Plaintiff of its rights and privileges to own, develop and sell property without due process of law in violation of the Fourteenth Amendment.

39.

The actions of the Defendants wrongfully and unlawfully reduced the value of Plaintiff's issued and outstanding stock, impaired its borrowing capacity, denied the Plaintiff the right to future profits and impaired Plaintiff's past investment in the industrial park, paralyzed the future development of the park and denied Plaintiff a return on its investment.

40.

The Defendants knew, or should have known, that the zoning of 37 acres of the Southern Industrial Park for agricultural use had the effect of prohibiting the completion of the development due to the extremely high development completion costs.

41.

While there were other changes in the zoning ordinance that resulted from the meeting of January 9, 1979, the changes were ill conceived, hastily determined and constituted a facade to attempt to justify the amendments that were directed at harming the Plaintiff's industrial development in the Township.

42.

The zoning changes proposed and planned for on or about January 9, 1979, did not conform to the spirit and general guidelines of the comprehensive plan which encouraged industrial development.

43.

On March 12, 1979, the conspiracy aforesaid was promoted by the passage of the amendments to the Shrewsbury Township zoning ordinance.

44.

The ordinance amendments of March 12, 1979, zoned 37 acres of Plaintiff's industrial park to an agricultural use, established the requirement that industrial parks were permitted only by special exception and all industrial use was limited to the special exception procedure except use of the industrial land as a research laboratory. Performance standards set forth in the amendments of the Shrewsbury Township Zoning Ordinance, as amended on March 12, 1979, are vague, indefinite, ambiguous and were designed to prohibit the sale of Plaintiff's land. The ordinance chills the free alienability of industrial land and under the circumstances constitutes an unreasonable and unconstitutional regulation of the same.

45.

Plaintiff promptly resorted to the state procedures available to contest the illegal actions of the Defendants. On May 23, 1985, the Commonwealth Court of Pennsylvania ruled §402 of the Township's Subdivision Ordinance was not a valid basis to deny approval of the Plaintiff's plan and that the rezoning of 37 acres constituted illegal spot zoning bearing no relation to the public health, safety, morals and welfare. The judgment of the state court is final and the within civil rights action is mature and ripe for consideration.

46.

Under Pennsylvania law, damages for inverse condemnation are not available to the Plaintiff. *Gabel v. Thornburgh Township*, 8 Pa. Commw. 399 (1973); *White's Appeal*, 287 Pa. 259 (1926). Only the within Federal action will provide Plaintiff with a remedy for the deprivation of its civil rights.

47.

The value of the 37 acres rezoned by the Township ordinance of March 12, 1979, from industrial to agricultural was $495,600.00. After its rezoning to agricultural use its value was $52,000.00 or a loss of $443,100.00.

48.

The Plaintiff's actual cost for site development from its initial preliminary approval through December, 1978, consisted of an investment of $119,119.00 as follows: $78,486.00 for construction of roads; $37,791.00 in

engineering costs: $2,921.00 utility costs; $23,000.00 additional engineering costs were incurred between December, 1978 and July, 1979.

49.

Because of the Defendants' unlawful agreement, the Plaintiff suffered the following additional costs that were incurred as a result of contesting the actions of the Defendants and being denied the use of its land:

| | |
|---|---|
| Legal fees, administrative costs, expert witness fees for hearings | $ 28,902.672 |
| Loss of interest on investment January 1, 1979 to August, 1985 | $291,004.36 |

50.

As a result of the delay caused by the unlawful conspiracy and actions of the Defendants, the economy has changed in the vicinity and the Plaintiff is now unable to readily market the lots even if approval were immediately given. In addition, the ordinance has so chilled the sales opportunity as compared to industrial developments in other municipalities in the County, the Plaintiff could not and cannot realistically sell the property.

51.

Plaintiff also claims loss of use of the developement during the period it contested the illegal actions of the Defendants in the state court from January, 1979 up to the present time.

52.

Plaintiff demand punitive damages.

53.

Plaintiff demands reasonable counsel fees, as provided by the law.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount in excess of $10,000.00, together with interest, counsel fees and costs of suit.

*SECOND COUNT*

54.

All preceding and succeeding paragraphs are incorporated herein.

55.

The zoning ordinance amendments of March 12, 1979, were designed to chill and prevent Plaintiff from exercising an economically viable use of its property. The said amendments are not in effect in any other municipalities of York County, except where the Defendant Malone was or is a solicitor to the municipality.

56

The Defendants insist on enforcement of the zoning amendments of March 12, 1979, and other burdensome ordinances that unfairly and unconstitutionally restrict the use of Plaintiff's industrial land, by depriving Plaintiff of the right to freely market and sell the same.

WHEREFORE, Plaintiff demands:

1. That the Defendant Township be enjoined permanently from enforcing the ordinances declared invalid and further that the Township be required to

amend the zoning map to accurately show all of Plaintiff's land as being zoned for industrial use.

2. That the Defendants be enjoined from enforcing the zoning amendments of March 12, 1979, and such other unfair ordinances that adversely and unconstitutionally prevent the free availability of Plaintiff's land.

3. That the Court shall determine that the said zoning amendments of March 12, 1979, are not binding upon the land of Plaintiff or, in the alternative, are unconstitutionally vague and unenforceable.

4. That the Defendants be required to pay the costs of suit and reasonable attorney's fees as provided by law.

5. Such other relief as the Court deems as just.

WHEREFORE, Plaintiff moves your Honorable Court to enter judgment in its favor as above, together with counsel fees and costs of suit.

Respectfully submitted,

LAUCKS & MONROE
By: DONALD L. REIHART
Donald L. Reihart
29 North Duke Street
York, Pennsylvania 17401
Tel: (717) 848-4900
*Attorneys for Plaintiff*

A trial by jury is demanded.

DONALD L. REIHART
Donald L. Reihart, Esquire
*Attorney for Plaintiff*

## APPENDIX F

### Statement of Facts

*STATEMENT OF FACTS*

I, Donald L. Reihart, Esquire, certify that the following Statement of Facts were presented to the Commonwealth Court of Pennsylvania and were relied upon by that Court in its Opinion reported at 89 Pa Commonwealth Court 468, 492 A2d 818 (1985).

The facts are based upon over 1000 pages of transcript and numerous exhibits. The references are to the official record established in the State Court.

DONALD L. REIHART
Donald L. Reihart, Esquire

On April 2, 1973, Pace filed a preliminary subdivision plan for the "Southern Industrial Park" that was approved by Shrewsbury Township. The park was 145.61 acres in size and was comprised of 43 lots ranging in size from 1.42 to 4.80 acres. (Exhibit "A", *infra*, p. 4, R. 315a)

Six (6) lots were promptly sold from the development and buildings were erected on Lots 1, 2, 22 and 27. (Exhibit "A", p. 5) *By contract, the developer agreed to provide sewer service to the purchasers of the lots.* (R. 334a) In the interim, an on-site sewage arrangement was allowed. However, the Township prohibited any further development of lots until the sewer was completed. (R. 368a, 370a through 418a, R. 14a)

Even though a cross-country sewer line was necessary to service the park, the Township did not actively pursue the construction of the sewer facility. The developer was left to fend for himself. (R. 25a, 93a)

*Appendix F—Statement of Facts.*

After years of constant effort by the developer it did become clear in the summer and fall of 1978 that the necessary authority to build the sewer would be granted to Pace. (Exhibit "A", *infra* #18, p. 6)

A dispute with one land owner over a right-of-way payment for the sewer line grew into an emotional plea to stop development of the Southern Industrial Park. (R. 419a)

In November and December, 1978, the land owner and his wife appeared before the Township Planning Commission and the Board of Supervisors and demanded the Southern Industrial Park be rezoned to a "conservation" or "agricultural" use. (R. 420a, 421a).

The land owner appealed to the emotions of the planners and supervisors. He circulated a petition. In an emotionally charged letter dated December 6, 1978, which was delivered to both the Supervisors and the Planning Commission, he claimed all manner of hazards and harm would result from a completion of the industrial park. (R. 422a, 427a)

The land owner's efforts and appeals fell upon fertile ground. Soon most of the area residents were demanding that the industrial development be stopped. (R. 420a, 421a) One of the members of the Planning Commission had a wife who actively circulated one of the petitions. (Exhibit "A" *infra* #5, p. 8.)

In response, the planners and supervisors of the Township set about to correct the fears generated by the complainant concerning the hazards of the development. (R. 56a-61a) They agreed to re-evaluate and consider

rezoning the Pace property to "agriculture" or conservation use. (R. 420a, 421a) (See also Exhibit "D" and "E", *infra*)

They invoked the recently enacted subdivision ordinance to thwart the developer by questioning the "adequacy of water supply." (R. 320a)

They worried the developer with retention ponds to handle large amounts of run off water. The developer in turn agreed to set aside several acres as a retention pond to prevent flooding. The developer also agreed to comply with all of the existing subdivision and zoning ordinances. (R. 335a, 336a) Pace hired a hydrogist and tried to convince the Township that there was an adequate water supply underground to service the park. The Township would not approve the plans using the water issue as its excuse. (R. 364a, 322a, 320a)

The Township officials used the time resulting from the critical evaluation of Pace's plans to develop a means of scuttling the development. (R. 344a)

On December 5, 1978, Pace submitted its final plan for approval to the municipality requesting approval of the development of the remainder of the industrial park which was not acted on by the Planning Commission on December 7, 1978 and rejected by the Township on January 12, 1979. (R. 315a)

On January 9, 1979 (sometimes erroniously referred as January 5, 1979), within one (1) month after Pace had filed its final subdivision plans, and before they were acted on, the Supervisors and Township planners met to consider changes to the Zoning Ordinance.

At that meeting of January 9, 1979, the elected and appointed officials devised the following zoning plan for industrial development.

First, they decided to rezone 37 acres of the industrial park owned by Pace, from "industrial" to "agricultural" to act as a "buffer zone". The total size of the industrial park was 145.61 acres. (Exhibit "A", *infra*, #1, p. 10) Thirty-seven (37) acres therefore, represents almost one-quarter (¼) of the total area of the industrial park.

In addition, the zoning amendments required that a "special exception" would be required for use of land in an industrial park. The amendment provided that all industrial uses, except as a "research laboratory" would need a special exception. (R. 344a)

The zoning ordinance also provided for certain "performance standards" had to be met by any person who desired to obtain a "special exception" for use of land in an industrial park. (R. 344a)

These performance standards required an applicant for a special exception to prove to the Zoning Hearing Board several matters. Among other things the applicant had to prove "that there was an adequate water supply for the proposed use which would not adversely effect the water supplies utilized by neighboring properties." (R. 345a, 346a)

Also, that there is "suitable access" to the site of the proposed use, taking into account the type of additional traffic movement likely to result from the location on the site proposed and that the use would not substantially increase traffic on residential streets and "farm roads."

*Appendix F—Statement of Facts.*

Buildings to be erected in conjunction with the proposed use had to be "suitably designed" and "landscaped" so as to be compatible with surrounding areas. (R. 346a)

There were no objective guidelines to determine when an applicant had complied with the standards.

Pace Resources was not invited to attend the meeting when the amendments were drafted. (R. 77a)

The meeting lasted from 9:00 a.m. in the morning until 5:00 p.m. in the afternoon. (Exhibit "A", #C, p. 9)

The first item to be considered was the specific provisions of the Zoning Ordinance. Thereafter the subdivision plan was considered. At approximately 4:00 p.m. or thereabouts in the afternoon, consideration was given to the changing of the Township Map. (*Ibid* d, p. 9)

The Township officials present at the January 9, 1979 meeting concluded that industrial zones were empty and undeveloped, but did not know why. (R. 69a) (It is noted that only six (6) lots were permitted to be sold out of the Pace Southern Industrial Park by Township resolution. Beyond that, no further development was allowed until the public sewer system was installed. (R. 21a) They made no effort to find out why the industrial zones were empty. (R. 65a)

The only investigation the Township Supervisors and Planning Commission members made to determine regional growth consisted of looking at the Township Zoning Map and how the zones are developed and by driving around the area. (R. 70a, 71a)

*Appendix F—Statement of Facts.*

The officials present at the meeting on January 9, 1979 did not consider the economic trends and labor markets that could supply the area. (R. 73a)

The officials present at the meeting on January 9, 1979 did not consider the labor market of Southern York County or Northern Maryland, or the general metropolitan York area. (R. 74a)

The officials present at the meeting on January 9, 1979 did not study the highway system which serviced the industrial park. (R. 74a)

The officials present at the meeting on January 9, 1979 did not look at updated population figures or at unemployment population figures within a 15 miles radius of the park. (R. 75a)

The Shrewsbury Township Subdivision Ordinance prohibits subdivision of farm land into parcels of less than 50 acres because small farms are thought to be unprofitable.

It was understood by the Township officials meeting on January 9, 1979 that the 37 acres of Appellant's land would not be a profitable farm unless it would be bought by an adjoining farm owner.

It is noted that Shrewsbury Township had made no effort to provide sewer services to the industrial park because the Supervisors felt that there was no urgent need. (R. 18a)

Shrewsbury Township had made no effort to provide water to various localities in the Township because the Supervisors felt there was no need. (R. 94a)

*Appendix F—Statement of Facts.*

On January 9, 1979, the Shrewsbury Township Commissioners had made no study to determine what water or sewer needs were found in the Township. (R. 93a)

Between 1973 and 1979, Shrewsbury Township made no effort to improve the road which serviced the industrial park. (R. 94a)

The solicitor for Shrewsbury Township delivered the proposed zoning changes adopted March 12, 1979 to the York County Planning Commission on January 31, 1979. (R. 299a) It was acted on, on March 14, 1979. (R. 299a)

The zoning ordinance amendments were adopted March 12, 1979, less than forty-five (45) days after their submission to the York County Planning Commission. The recommendations of the York County Planning Commission was against zoning 37 acres of Pace's land from industrial to agricultural. (R. 302a)

On March 7, 1979, Pace, who knew nothing of the proposed changes, appeared before both the Planning Commission and the Supervisors and again requested final approval for development of the Southern Industrial Park. (R. 336a)

The Planning Commission rejected the plans. The developer then requested the Supervisors to "continue action" on the plans until the recommendations of the Planning Commission could be complied with. Pace agreed to waive the time limits of the Pennsylvania Municipalities Planning Code and agreed to comply with all zoning and subdivision regulations. (R. 336a)

*Appendix F—Statement of Facts.*

Because the Supervisors intended to pass the zoning amendments mentioned above and because their solicitor advised them that if they granted the continuance to the Southern Industrial Park it would not be subject to the new ordinance amendments, they unanimously refused the continuance and rejected the plan. (R. 141a)

On March 12, 1979, the ordinance amendments were adopted. The ordinance amendments rezoned 37 acres of the developer's lands from industrial to agricultural use and provided the special exception procedure mentioned above.

At the time of the adoption of the questioned amendments, the Southern Industrial Park was the *only* active industrial development in the Township. (R. 69a, 167a, 158a)

The Township indicated a fundamental desire to maintain agricultural land in the Township and provided this as a reason for changing the zoning as set forth in the amendments. (R. 112a)

However, after the rezoning there was less agricultural land than there was before. (Exhibit "A", *infra*, #13, p. 12)

The Township Supervisors claimed the desire to avoid potential hazards presented by traffic and water problems, however, they had before them no evidence of any such hazards and made no effort to determine if they really existed. (R. 132a) They zoned the 37 acres as a "buffer zone" between the park and the residential area located adjacent to the park. (R. 54a)

A traffic problem touted by the neighbors proved most fallacious. Only six (6) homes are passed by traffic traveling from the park through Tolna to the expressway located a short distance away. (R. 132a)

The Township denied wanting to thwart Pace's development and gave the reason for reducing the Southern Industrial Park as, in addition to creating a buffer zone, only three (3) sites had been developed, the Township did not need industry, the roads were poor and there were questions about drainage and water supply. (R. 113a)

Also, if the entire industrial zone were allowed to be developed, "the development would create a demand for more employees for labor which in turn would invite more residential development, which would eat away agricultural areas." If industry is developed in the Township, the Supervisors felt this would create an undesirable influx of workers who would want to build homes, thus increasing the population and undermining the agriculture in the area. (R. 112a, 122a)

At the hearings conducted before the ZHB between September, 1979 and May, 1980, Pace called several witnesses whose credible testimony was ignored.

Despite evidence to the contrary, the ZHB failed to find that Pace was the *only owner* of a developing industrial park in the Township and the *only owner* immediately and irreparably affected by the zoning changes. (R. 157a, 69a)

Pace spent $119,198.00 in improvements in the industrial park, plus the cost of constructing a sewer line cross country to service the industrial park and a

commitment to spend $145,600.00 in constructing a public sewer to the park. (R. 413a, 30a) In addition, the evidence indicated that the value of Pace's land before the rezoning was $495,600.00, while his value afterwards was $52,500.00, or a loss of $443,100.00. (R. 42a) Neither the Zoning Hearing Board nor the Court of Common Pleas made findings concerning the expenditures or the costs, or the losses suffered by the Township's zoning change.

For example, the Board failed to make essential findings arising from the testimony of Mr. George Stallman.

Mr. Stallman was the original planning expert who prepared the zoning ordinance and comprehensive plan adopted by the Township in 1976.

Mr. Stallman testified that the documents required 250 hours of preparation and included 34 meetings with the Supervisors. (R. 252a) He also testified that the Southern Industrial Park was zoned industrial in 1976 because the comprehensive plan anticipated growth and because the decision was made to locate industrial parks close to interstate interchanges. (R. 253a)

In the original plan the planners recognized that access to the Southern Industrial Park was one of its negative aspects and therefore considered important to improve the Tolna road access or provide new access. (R. 254a)

The positive aspects of the Southern Industrial Park were its access to interstate roads and the existence of a railroad as well as *pre-existing industrial uses.* (Emphasis ours) (R. 254a-256a)

The importance of this evidence is reflected by Mr. James Stuchell who testified as an expert land use planner for Pace.

He stated, "They (officials of the Township) completely switched around the goals of the comprehensive plan outlined for the development of the Township." (R. 181a)

Mr. Stuchell testified that the control was "so tight" in the industrial zone after the zoning amendments of March 12, 1979, that they had almost prohibited development. (R. 183a) He felt the special exception procedure was a "subterfuge and contrary to the comprehensive plan that encouraged industrial development." (R. 184a)

Paces expert land use planner also testified that the standards for industrial use were so nebulous, vague and indefinite that they would adversely effect the industrial development in the Township. (R. 191a, 192a, 193a)

He explained why he felt the standards were vague and would have this effect. "Suitable access", "inadequate water supply" and "suitably designed buildings" were all too vague. He questioned to whose satisfaction were the requirements be met. How would they be met? Would it be the zoning officer or the zoning adjustment board?

He concluded, "By doing this sort of thing. . .they are in effect prohibiting industry and they don't want it. . ." (R. 193a)

No findings of fact by the ZHB or the Court reflect the uncontroverted testimony of either of the above witnesses.

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1640

In The
# Supreme Court of the United States
October Term, 1986

PACE RESOURCES, INC.,

*Petitioner,*

v.

SHREWSBURY TOWNSHIP, JOHN J. O'KEEFE, CLARENCE E. NACE, JOHN D. DUTTON, GILBERT G. MALONE, WILLIAM J. SOLOMON, CARL NIELSEN, RICHARD M. GRIM, RONALD McKAY and LARRY G. SPANGLER,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 86-5210

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## STATEMENT OF THE CASE

This case concerns a dispute between Shrewsbury Township (Township) and Pace Resources, Inc. (Pace) over industrial development in the Township. The dispute centers on what amount of land should be made available for industrial development and with what environmental standards industry should be required to comply.

In early 1979, the Township undertook a comprehensive revision of its zoning ordinance. This revision involved 52 textual amendments and numerous map changes, most of which had no relevance to Pace. Significant to this case, a total of 120 acres of total land was rezoned from industrial to agricultural. Pace owned 145 acres in the Township, of which 37 acres was subject to the rezoning. In addition, the Township created a mandatory special exception procedure requiring the adherence to certain environmental requirements before any industrial development could occur.

The agricultural district regulations established by the Zoning Ordinance would allow Pace's 37 acres to be used, not only for agricultural uses, but also for four dwelling units, and by special exception, certain specified industrial uses including "manufacturing and assembly, warehousing and storage, research and testing laboratory, building or construction contractor and carpentry, machine repair and similar shops." Pace never made any application for any of the permitted non-agricultural uses.

In December of 1978, Pace submitted a final subdivision plan for approval. This plan had a number of deficiencies, which Pace requested time to correct. Accord-

ingly, on February 7, 1979, the Township deferred action on the subdivision plan at the request of Pace so as to allow Pace time to correct these deficiencies. The plan was rejected by the Township on March 7, 1979, when the deficiencies in the plan had not been corrected. The primary deficiency was the failure of Pace to demonstrate that there would be an adequate water supply for the proposed industrial uses. None of the 1979 amendments, which formed the basis of Pace's Section 1983 complaint, were applied to reject this plan.

In the summer of 1979, Pace resubmitted its plan and obtained final approval for 18 of its 47 lots. It was for these 18 lots that Pace incurred all of its costs for roads and utilities as alleged by Pace in paragraph 48 of its Complaint.[1] Pace has made no improvements to any of the remaining 29 unapproved lots. Although the 18 lots have been approved for almost 7 years, Pace has not sought a special exception to permit industrial development on any of these approved lots.

Pace filed an appeal to the March 7 rejection of its subdivision plan. In addition, Pace substantively challenged those amendments to the Township zoning ordinance which affected its property. Further, Pace procedurally challenged the Township's enactment of its amendments to the zoning and subdivision ordinances. On December 27, 1980, the Shrewsbury Township Zoning Hearing Board dismissed Pace's challenges to the ordinances. Pace then appealed to the Court of Common Pleas of York County.

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[1]Pace's Complaint alleges $119,119.00 in site improvements (App. E, 78a) rather than $140,000.00 as set forth in its "Statement of Facts".

Pace's substantive arguments were that: The zoning amendments were invalid as special legislation; violated the comprehensive plan; represented illegal delegations of authority; constituted exclusionary zoning; constituted spot zoning; and represented a taking without just compensation with the Fifth and Fourteenth Amendments to the United States Constitution. The court rejected Pace's procedural challenges and rejected Pace's substantive challenges except that the court held that the provisions requiring a demonstration of adequacy of water supply for certain special exception uses, including manufacturing uses, were too vague to meet the requirements of the Pennsylvania Municipalities Planning Code. With respect to the appeal from subdivision plan rejection, the court held that the water supply requirements were insufficiently specific to form a basis for subdivision plan rejection under applicable state statutory law. Accordingly, the court directed the Township to reconsider the subdivision plan rejected on March 7, 1979, and to grant conditional approval of the plan, if the defects other than those related to adequacy of water supply, applying pre-1979 requisites, were found to be minor in character. Pace never resubmitted that plan for reconsideration.

Instead of using this opportunity to have its plan reconsidered without water supply requirements, Pace appealed to the Commonwealth Court of Pennsylvania and the Township cross-appealed. The Commonwealth Court sustained the Court of Common Pleas of York County except that the Commonwealth Court ruled invalid the rezoning of the 37 acres from industrial to agriculture as

spot zoning.[2] Although vigorously urged to do so by Pace, the Commonwealth Court did not find that the zoning amendments represented special legislation or an unconstitutional taking by the Township.

Pace may now use its entire property for industrial purposes within the limits of the ordinance.

During the pendency of the state litigation, Pace filed a complaint in the United States District Court for the Middle District of Pennsylvania. After the ruling by the Commonwealth Court, Pace amended its complaint to allege that the Defendants conspired to prevent the development of Pace's industrial park and that pursuant to such conspiracy, the Defendants drafted and enacted certain ordinance provisions which would have the effect of precluding industrial use of this land. (Par. 36, App. E, 75a). Pace alleged that the rezoning constituted a "taking" of Pace's property. (Par. 37, 46 and 47 of amended Complaint; App. E, 76a, 78a) and a denial of substantive due process. (Par. 38, App. E, 76a).

The United States District Court granted the Township's motion to dismiss the complaint for failure to state a claim for damages. The District Court ruled that invalidation of the offending ordinance rather than monetary damages was the exclusive remedy for zoning enactments which result in a regulatory taking or which involve a violation of substantive due process. The United States Court of Appeals for the Third Circuit held that there was neither a taking of Pace's property nor a violation of

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[2]*Pace Resources v. Shrewsbury Township Planning Commission, et al,* 89 Pa.Cmwlth. 468, 492 A.2d 818 (1985).

Pace's substantive due process rights. As a result, the Third Circuit did not reach the issue of whether damages was an appropriate remedy.

## SUMMARY OF ARGUMENT

Pace's Petition for Certiorari fails to demonstrate that this is an appropriate matter for review by this Court pursuant to the considerations set forth in Rule 17 of the Supreme Court Rules. The decision of the Court of Appeals for the Third Circuit correctly found that neither a taking nor a substantive due process violation had occurred. Pace's petition does not allege that the Court of Appeals resolved any federal law question in a manner so as to conflict with any decision of any other court of appeals or a state court of last resort. Pace does not establish that the Court of Appeals' resolution of the "taking" and "substantive due process" issues represented a departure from the accepted and usual course of judicial proceedings, involved important but unresolved questions of federal law, or were in conflict with decisions of this Court.

The issue of the availability of damages as a remedy for a temporary regulatory taking or a land use substantive due process violation was not ruled upon by the Court of Appeals and thus is not ripe for review by this Court.

## ARGUMENT

### I. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED ON THE ISSUE OF AVAILABILITY OF DAMAGES AS A REMEDY FOR TEMPORARY ZONING ACTION WHICH VIOLATES CONSTITUTIONAL PROTECTIONS.

Pace cannot benefit from a ruling that damages are a remedy for temporary zoning action violative of constitutional protections, since the Court of Appeals held that there was no unconstitutional zoning action by the Township. While the issue of whether damages, as opposed to invalidation, can ever be a remedy in a case involving the temporary unconstitutional zoning of land was left open by this Court in its decisions of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 105 S.Ct. 3108 (1985) and *MacDonald, Sommer and Frates v. Yolo County,* 106 S.Ct. 2561 (1986), this issue is not presented in this case. Although the District Court did dismiss Pace's claims based upon the unavailability of such a remedy, the decision of the Third Circuit that there was no unconstitutional zoning action, precludes the award of any damages to Pace.

Moreover, any damage action Pace would have is precluded because Pace never established during the state litigation what use it could make of its land. Pace never applied for any of the permitted residential uses, for any of the specially permitted industrial uses, or for any other non-agricultural use on its 37 acres which had been rezoned agricultural. This Court has emphasized that "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain(s) any reasonable beneficial use or whether [existing] expectation interests ha[ve] been

destroyed." *MacDonald, Sommer & Frates v. Yolo County, et al, supra* at 2566 (quoting, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra* at 3116, 3118, n.11). In *MacDonald,* this Court indicated that it would insist "on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 106 S.Ct. at 2567. Pace had applied for such an intense development of its property that the Township concluded that such development could not be supported by the existing underground water supply. At no time did Pace ever apply for any of the less intensive uses permitted in an agricultural zone, nor did Pace modify its proposal so as to reduce the intensity of its development to a level consistent with the Township's determination of the available water supply.

Finally, the existence of a damage remedy for an unconstitutional rezoning is irrelevant unless some development that could have occurred in the absence of such rezoning is precluded by it. It was the Township's determination that Pace lacked sufficient ground water supply to permit it to develop its property to the intensity it desired. The Township's determination of water availability could not permit the development of all of the 108 acres remaining in the industrial classification in the manner envisioned by Pace much less the 37 acres rezoned by the Township. The water availability issue was resolved at the same time as the rezoning issue. Thus there was never a point in time that that rezoning in and of itself acted to preclude Pace's development activity. At no time has Pace ever alleged that had the Township's interpretation of its water availability requirements been codified it would have been unconstitutional.

## II. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE THIRD CIRCUIT'S FINDING THAT THERE WAS NO UNCONSTITUTIONAL TAKING.

Pace alleged both in the state court system and in the district court that the rezoning of the 37 acres constituted an unlawful taking without just compensation. No court which has reviewed this issue has ruled in favor of such a claim. The Court of Common Pleas of York County held: "We find that there has been no taking of Pace's land without just compensation in derogation of the Fifth and Fourteenth Amendments to the United States Constitution." *Pace Resources, Inc. v. Shrewsbury Township Planning Commission, et al*, 79-S-1034, 81-S-277 (March 12, 1984) *quoted in* 808 F.2d at 1027, App. B, 30a. This finding was not disturbed by the Commonwealth Court on appeal. Contrary to the assertion by Pace in its brief, the United States District Court for the Middle District of Pennsylvania did not rule on whether or not a taking occurred, but rather concluded that even if such a taking had occurred, damages were not an appropriate remedy. App. A, 8a; *See* 808 F.2d at 1028; App. B, 32a. The Third Circuit undertook a factual analysis of Pace's complaint and determined from those facts that no taking had occurred. Since the Third Circuit determination of whether or not a taking had occurred involved a factual analysis, its application of federal legal principles in this case does not involve a clear issue of federal law such as is envisioned by Rule 17 of the Rules of the Supreme Court of the United States as a basis for granting certiorari. Pace, in its petition, has not identified any federal court of appeals or any state court of last resort opinion which has decided this issue in a manner different from the ruling of the Third Circuit. Pace has not identified "an important question of

federal law which has not been, but should be, settled by this Court'' or that the Third Circuit, ''has decided a federal question in a way in conflict with applicable decisions of this Court.'' Sup.Ct.R. 17.1(c).

Although Pace in paragraph 37 of its Complaint alleged a taking without just compensation, (App. E, 78a), such allegation is purely conclusory and is not supported by adequate factual allegations. Pace has never alleged that following rezoning, its property was unsuited for any of the uses permitted by the zoning or that as a result of the rezoning its property had no value or only a distress value for any permitted purpose.

The test of ''taking'' is not whether the zoning ordinance denies the owner the most economically appropriate use of his property, but whether the ordinance permits him any reasonable use of his land. *Penn Central Transportation Company v. New York City*, 438 U.S. 105, 125 (1978). The fact that the impact of the regulation has brought about a reduction in the value of Pace's property or that some more profitable use could be made of Pace's property than that permitted by the ordinance is insufficient to establish a ''taking''. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadachek v. Sebastian*, 239 U.S. 394 (1915).

Assuming that the reduction in value of a property is quite substantial, there is no taking if there remains a reasonable residual value in the land for permitted uses. In *Village of Euclid v. Ambler Realty Co., supra,* the reduction in value was from $10,000.00 per acre to $2,500.00 per acre. In *Hadachek v. Sebastian, supra,* the reduction in the total value of the land was from $800,000.00 to $60,000.00.

Nowhere in Pace's complaint did it allege that its land cannot be reasonably used for agricultural purposes. In fact, the 37 acres rezoned agriculture is suitable for that use and has been farmed since purchased by Pace. 808 F.2d at 1031; App. B, 38a n.4.

Shrewsbury Township's ordinance provisions relating to the agricultural district have been upheld by the Supreme Court of Pennsylvania, *Boundary Drive Associates, Inc. v. Shrewsbury Township,* 507 Pa. 481, 491 A.2d 86 (1985), as an appropriate means for carrying out the legitimate governmental goal of farmland preservation insofar as they apply generally throughout the Township and the limitations on uses generally applied in that district clearly do not constitute a taking. While in this case the Commonwealth Court determined that the placing of Pace's 37 acres in an agricultural zone represented spot zoning because it was surrounded by land with other zoning classifications (it being adjacent to residential, industrial and conservation zoned land but not immediately adjacent to any agriculturally zoned land), there is nothing inherently confiscatory in such a zoning classification. Agriculture is a permitted use and the owner of a 37-acre tract is permitted four dwellings and numerous other uses including industrial uses by special exception.

Pace admits that the property has a value of over $1,400.00 per acre for agricultural uses. (Par. 47, App. E, 78a). Such a value does not constitute a distress value or a value rendering the property practically worthless. As pointed out by the Third Circuit in its opinion, the $1,400.00 value compares favorably with Pace's original $515.07 per acre investment. 808 F.2d at 1031, App. B, 38a n.4.

Pace's 37 acres, like most land in the Township, was placed in the agricultural district. While possibly this land did not have as much value as it would have had in the industrial zone,[3] Pace was not forced to have its land adversely affected relative to other lands in the community. The rationale of the dissenting opinion in *San Diego Electric Co. v. San Diego,* 450 U.S. 621, 636-661 (1981), supporting the award of damages in "regulatory taking" cases was that the government should not force some individuals to bear burdens which in all fairness should be borne by the public as a whole. Pace's situation was the converse. In having any of its land zoned industrial it was receiving a benefit not received by landowners generally.

Finally, Pace was not without a full and complete remedy under state law. If there was something unique with respect to Pace's land which rendered it economically unuseable for the uses permitted in the agricultural district, Pace could have submitted an application for a variance pursuant to Section 14.12 of the Township zoning ordinance which restates Section 912 of the Pennsylvania Municipalities Planning Code. (53 P.S. § 10912). The granting of a variance is appropriate when an otherwise valid ordinance when applied to a particular tract of land is confiscatory. *A & D, Inc. v. Zoning Hearing Board, East Nottingham Township, Chester County,* 32 Pa.Cmwlth. 367, 379 A.2d 654 (1977). Pace never made any application for a variance under state law.

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[3]Pace's estimate of the value of industrially zoned land in Shrewsbury Township is vastly exaggerated. Expert testimony before the Zoning Hearing Board indicated the value of Pace's land if zoned industrial at $1,721.00 per acre, only slightly above its agricultural value. Pace's valuation analysis was based upon expected gross lot sales without subtracting either development costs or selling costs.

## III. THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE THIRD CIRCUIT'S FINDING THAT NO SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED.

Pace argued also that some of the Township activities violated its substantive due process rights. All of such claims were rejected by the District Court with one exception. The District Court felt compelled to consider the rezoning of the 37 acres as a substantive due process violation because the Commonwealth Court of Pennsylvania had found such rezoning to be invalid as "spot zoning" even though the Commonwealth Court, in its opinion, never made any reference to federal constitutional provisions. The Commonwealth Court characterized the rezoning as "arbitrary and unjustifiably discriminatory"[4] but did not indicate whether its determination of invalidity resulted from a finding that the rezoning exceeded the powers granted the Township by the enabling statute, violated state constitutional requirements, or violated federal constitutional requirements. Because the Commonwealth Court's review, if intended to be of federal due process law, was, as is shown below, clearly erroneous, it should be presumed that the review was based on state constitutional or statutory requirements.

The Court of Appeals ruled that the District Court had erred in finding that the Commonwealth Court's ruling of invalid spot zoning compelled a finding of a violation of federal substantive due process. Rather, the Court of Appeals determined that it, "must look instead to whether,

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[4]Such characterizations do not necessarily refer to federal constitutional requirements. They may involve state constitutional requirements or even state statutory requirements. *See Couf v. DeBlaker,* 652 F.2d 585, 589 (5th Cir. 1981).

given the facts alleged in the amended complaint, the Township could have had a legitimate reason for its decision." 808 F.2d at 1035, App. B, 46a.

Pace, in its petition for a writ of certiorari, has abandoned all of its original substantive due process claims other than the claim concerning the rezoning of its 37 acres.

Though this singular claim does present a legal issue, Pace has not identified any federal court of appeals which has rendered a decision in conflict with the Third Circuit. Pace has also not identified a state court of last resort which has decided a federal question in such a way as to conflict with the decision of the Third Circuit on such federal question. Finally, Pace has not established that this issue is an unsettled but important question of federal law which should be settled by this Court.

Without so stating, Pace is asking this Court to reverse its decision in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), where this Court held that state court determinations that state legislation violated the Equal Protection and Due Process Clauses were not determinative in the federal system. Each state of the union, including Pennsylvania, has its own constitutional provisions which guarantee substantive due process. Each state's own court of last resort is the final interpreter of that state's constitutional provisions. As this Court stated in footnote 6 to its opinion in *Minnesota v. Cloverleaf Creamery Co., supra*, at 461:

> A state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses . . . . but when a state court

> reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed. *Oregon v. Hass*, 420 U.S. 714, 719, 43 L.Ed. 2d 570, 95 S.Ct. 1215 (1975).

The contrast between Pennsylvania due process law and federal due process law illustrates the differing standards of scrutiny. Pennsylvania substantive due process law requires the "reviewing court to balance the public interest served by the zoning ordinance against the confiscatory or exclusionary impact of regulation on individual rights." *Boundary Drive Associates, Inc. v. Shrewsbury Township,* 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). In *Hopewell Township Board of Supervisors v. Golla,* 499 Pa. 246, 452 A.2d 1337 (1982), the Supreme Court of Pennsylvania stated that:

> The function judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner's freedom thereby incurred. A conclusion that an ordinance is valid necessitates a determination that the public purpose served thereby adequately outweighs the landowner's right to do as he sees fit with his property so as to satisfy the requirements of due process . . . Although zoning almost always has a worthwhile objective, since it is a restriction on and a deprivation of a property owner's constitutionally ordained rights of property, it can be sustained only if it is clearly necessary to protect the health or safety or morals or general welfare of the people.

*Id.* at 256, 452 A.2d at 1342.

As pointed out by the Court of Appeals, the rule of law as applied by the Commonwealth Court in this case,

"bears no resemblance to any aspect of federal due process law" 808 F.2d at 1034, App. B, 44a. It even placed on the Township the burden of proving the requisite relation to "public health, safety and welfare". 808 F.2d at 1035, App. B, 46a, referring to Commonwealth Court opinion at 89 Pa.Cmwlth. at 475, 492 A.2d at 821, App. C, 59a.

This state standard of inquiry is far different from the standard of inquiry which this Court has directed be followed. As the Third Circuit pointed out in *Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981), at one time the Supreme Court applied a standard similar to what continues to be applied by the State of Pennsylvania. The Supreme Court was:

> willing to question the fairness and wisdom of a particular state statute and despite disclaimers to the contrary, to substitute its judgment about social policy for that of the legislative body. If the statute, in the court's opinion did not further the public interest in safety, morals or welfare, the law was held to exceed the authority of the legislature and therefore to abridge the liberty and property protections of the due process clause. In more recent years, the court has abjured this supervisory role, however, and now applies virtually the same standard of review under the due process clause or it does in equal protection cases involving economic classifications. The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. 'The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and it might be thought that the particular legislative measure was a rational way to

> correct it. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955).'

*Id.* at 689.

Under federal law, the burden of proof is not on the municipality. As the Court of Appeals correctly pointed out, it is the plaintiff making a substantive due process claim who has the burden of showing that the regulation is irrational and that the municipality could not have had a legitimate reason for the legislative decision. 808 F.2d at 1035, App. B, 46a. *See also Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) *cert. denied*, 106 S.Ct. 3276 (1986) and 107 S.Ct. 89 (1986) (extensive discussion regarding the different standards for substantive due process review for federal constitutional law violations and by some state court systems for violations of their constitutional mandates).

Significantly most states, including Pennsylvania, do not provide a damage remedy for substantive due process violations involving land use policy. Thus, the closer scrutiny of zoning provisions on the state level does not have the effect of inhibiting innovative legislative activity. *See* Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113, 136, 139 (1985). The reduced due process scrutiny permitted by the federal court system would substantially reduce the occasions for a damage remedy should one ultimately be permitted by this Court. However, should this Court ultimately permit a damage remedy and permit state court due process determinations to be conclusory for federal purposes, the fact situation which would permit a federal monetary recovery would vary greatly from state to state depending

on the level of due process scrutiny applied by the state's judicial system. This would create a situation where a landowner would try to assert a due process claim in state court, and after the state court had determined that such a violation had occurred, the landowner would then assert his damage claim in federal court, even though his due process claim would not prevail if originally presented in federal court.

As the Third Circuit correctly concluded, applying federal due process law, it was rational for the Township to desire to restrict industrial presence in the Township. 808 F.2d at 1036, App. B, 49a. The Third Circuit concluded that the reduction in the size of the industrial district was a rational means of accomplishing that objective. 808 F.2d at 1036, App. B, 49a.

Pace, in its petition, emphasizes that the ordinance amendments were promoted by citizens who were concerned as to its impact on them. Most legislation occurs as a result of the citizenry bringing to the attention of the elected officials those problems and concerns which the citizenry feels should be remedied. The Township citizens in this case were given far less than they wanted. They wanted the entire industrial zone in their portion of the Township eliminated. The Board of Supervisors made a finding which it felt was reasonable under all the circumstances.

The Commonwealth Court was incorrect when it said that "the rezoning of Pace's land to 'agriculture' was accomplished by the Board of Supervisors in only an hour from the introduction of the ordinance to its final passage." 89 Pa. Cmwlth. at 475, 492 A.2d at 821, App. C, 59a. In its own brief to the Commonwealth Court, Pace asserted

in its Statement of Facts that the decisions ultimately articulated in the ordinance amendments were largely arrived at during an all-day meeting on January 9, 1979. App. F, 84a-85a. Following such meeting, drafts of the proposed ordinance were prepared by the Township Solicitor and made available for review by the Township Planning Commission at its January meeting. The Planning Commission recommended the changes to the Board of Supervisors, which reviewed the changes at its February meeting. The Board of Supervisors directed that the proposed ordinance be advertised for a public hearing on March 7, 1979. The public meeting resulted in several minor revisions which were recommended and placed in final form for enactment on March 12, 1979. During this time, the proposed ordinance was presented to the York County Planning Commission for its review by a letter from the Township dated January 29, 1979, a portion of which letter is referred to by the Third Circuit in its Opinion. App. B, 48a.

The Township zoning amendments intended to reduce the amount of land zoned for industrial uses and to insure that any industrial use would comply with strict environmental standards. This would make industrial development more difficult for Pace as well as for others who owned industrially zoned property. Some property, except for light industrial uses permitted by special exception in the agricultural district, would be unavailable for any industrial use.

These actions were not taken as a result of any animosity directed at Pace or for any personal financial gain for those who enacted the regulation. 808 F.2d at 1026, App. B, 27a-28a. These actions occurred in furtherance of

what those who enacted the regulations believed (rightly or wrongly) constituted the furtherance of the best land use planning goals for the Township. These goals were to preserve prime agricultural land and to limit industrial development to that amount which the Township reasonably believed to be needed by the Township and to guarantee that such development as did occur was limited to high quality, clean industry without undesirable environmental side effects. That the rezoning did not significantly change the total amount of lands zoned agricultural, does not mean that the Township's rezoning was not rationally related to its goal. The zoning amendments changed the agricultural district so that more high quality agricultural land was brought into the district and to compensate land of lower quality for agricultural use was made available for development uses, in particular, residential development. The Township's commitment to agricultural preservation is evidenced by its successful defense of its innovative agricultural preservation provisions in the state court system through the Supreme Court of Pennsylvania. *Boundary Drive Associates, Inc. v. Shrewsbury Township, supra.* A review of Pace's Statement of Facts presented to the Commonwealth Court of Pennsylvania, which Pace claims the Third Circuit failed to consider as an amplification of the allegations in its complaint, reveals nothing which detracts from the fact that the Township's actions were rationally related to its legitimate goals.

Finally, Pace attempts in its petition to raise a procedural due process claim which it failed to raise in its complaint. Pace was not denied its procedural due process rights. Pennsylvania law concerning the enactment of

zoning ordinance amedments provides that prior to voting on such an enactment of a zoning ordinance amendment, the govering body must hold a public hearing pursuant to public notice. A proposal must be submitted to a county planning agency at least 30 days prior to the hearing. Pennsylvania Municipalities Planning Code, Section 509, (53 P.S. § 10609). Nowhere in its complaint does Pace allege that this Pennsylvania procedure for the enactment of zoning ordinance amendments represents a denial of procedural due process, nor does Pace allege that such procedure was not followed in this case.

The amendments to the Township ordinance involved over 50 textual changes and numerous map changes. Virtually everyone in the Township, not only Pace, was affected by one or more of these changes. A requirement of individual notice would have been totally unworkable. Apart from those affected by the textual amendments and those whose lands were changed from residential to agricultural or vice versa, there were property owners other than Pace whose land was rezoned from industrial to another classification.

As pointed out by the Court of Appeals, this case is remarkably similar to that which confronted the Court of Appeals for the First Circuit in *Creative Environments, Inc. v. Esterbrook,* 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982). In that case, the plaintiffs complained that the town "motivated by parochial views of local interest" had violated due process, "in order to protect 'the town's basic character' ". 808 F.2d at 1036, App. B, 49a. The Court of Appeals quoting from the opinion of the First Circuit in *Creative Environments, Inc. v. Esterbrook, supra,* at 833 stated that, "Such a claim is too typi-

cal of the run of the mill dispute between a developer and a town planning agency regardless of [plaintiff's] characterizations of it and of defendants alleged mental states, to rise to the level of a due process violation". *See also Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983).

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## CONCLUSION

The Court of Appeals correctly determined that there was no taking under the Fifth and Fourteenth Amendments and no substantive due process violation of the Fourteenth Amendment and therefore did not reach the remedy issue. The Court of Appeals rulings are consistent with prior rulings of this Court and with the other federal courts of appeal. The Court of Appeals decision is not in conflict with the decision of any state court of last resort with respect to any federal constitutional question. No important but unresolved issues of federal law are presented.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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